

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-1484

To be argued by
JED S. RAKOFF

**United States Court of Appeals
FOR THE SECOND CIRCUIT**

Docket No. 77-1484

UNITED STATES OF AMERICA,

Bgs
Appellee

—v.—

ARNOLD NELSON MAHLER (also known as
"Arnold Nelson"), and DEAN H. UBBEN,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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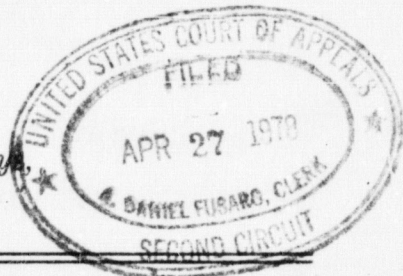


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Defendants-Appellants.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Arnold Nelson Mahler and Dean H. Ubben appeal from a judgment of conviction entered in the United States District Court for the Southern District of New York on December 8, 1977, following a trial before the Hon. Milton Pollack, United States District Judge, and a jury.

Mahler and Ubben were the dominant figures among eighteen persons charged with criminal responsibility for a sophisticated, nationwide securities swindle involving the common stock of Industries International, Inc. Prior to any indictment, eight of the eighteen conspirators pleaded guilty to felony Informations filed in this District.* The remaining ten conspirators, including Mahler

* These eight defendants were Edward Currie, Craig Hanson, Harold Herman, Stanley Needleman, David Norblom, Larry Plew, William Wellens and Theodore Zucker.

and Ubben, were initially charged in a twenty-count Indictment, 76 Cr. 1047, filed November 11, 1976. Prior to trial, two more defendants pleaded guilty.* Trial of the remaining eight defendants commenced on April 11, 1977 before the Hon. Marvin E. Frankel, United States District Judge, and a jury, and lasted for seven weeks. The jury acquitted three defendants ** but was still deliberating as to the other five when one of the jurors suffered a heart attack. Upon the refusal of Mahler and Ubben to stipulate to an eleven-juror verdict, a mistrial was declared.

The case was re-assigned to Judge Pollack and, at the request of the defendants, the retrial was put over to October, 1977. In late September, all remaining defendants except Mahler and Ubben entered guilty pleas.*** A few days later, on October 4, 1977, the grand jury returned a superseding indictment, S. 76 Cr. 1047, naming only Mahler and Ubben as defendants, narrowing and simplifying the original charges, and reducing the number of counts to thirteen.**** Trial on the superseding indictment commenced October 11, 1977, and ended on October 26, 1977 when the jury returned a verdict of guilty against both defendants on all counts. On December 8, 1977, Judge Pollack, taking note of the "enormity of the offenses" for which these defendants stood convicted, sen-

* They were Michael Dutzar and Maurice Rind.

** They were Lawrence Bialek, Marvin Greenberg and Billy Joe Knight.

*** They were Jarrold Bachmann, John J. Hughes III, and Billy Lovejoy.

**** Specifically, Counts 1, 4, 6 and 7 charged violations of the securities fraud statute, 15 U.S.C. §§ 77q(a) and 77x; Counts 2, 5, 9, and 11 charged violations of the wire fraud statute, 18 U.S.C. § 1343; Counts 3, 8, 10 and 12 charged violations of the mail fraud statute, 18 U.S.C. § 1341; and Count 13 charged violation of the conspiracy statute, 18 U.S.C. § 371. All but the last count also charged violations of the aiding and abetting statute, 18 U.S.C. § 2.

tenced Mahler and Ubben to total prison terms of twelve and eight years respectively. This appeal followed.*

Statement of Facts

Government's Case

The swindle perpetrated by Mahler and Ubben was a large-scale example of a familiar stock fraud scheme known as the "shell game." In the "shell game," an inflated public market is created for the stock of a small, fly-by-night private firm by merging it with a dormant but public "shell" corporation and misrepresenting the resultant entity as a worthy investment. As summarized by Prof. Bloomenthal:

"The shell game in its classical form, as we have noted, is designed to result in artificially inflated stock prices fed by false rumors with the organizers bailing out at inflated prices. As such, it is likely to involve an unlawful manipulation, fraudulent representations, the distribution of securities in violation of the registration provisions, and recommendations by brokers without an adequate basis." **

* While Ubben remains free on bail pending this appeal, Mahler was remanded by Judge Pollack on the joint grounds that he presented a substantial risk of flight and that he lacked any substantial grounds for appeal. Mahler's subsequent motion for bail pending appeal was denied by this Court (Oakes, Van Graafeiland, and Bartels, JJ., with the latter recusing himself) on December 15, 1977.

** H.S. Bloomenthal, *Securities and Federal Corporate Law* (1977) at pp. 12-58. "Shell game" frauds, and the closely similar "spin-off" frauds, have been the subject of a number of criminal prosecutions and SEC enforcement actions affirmed by this Court. For example: *United States v. Robinson*, 543 F.2d 951 (2d Cir. 1976); *SEC v. Management Dynamics, Inc.*, 515 F.2d 801 (2d Cir. 1975); *SEC v. Spectrum, Ltd.*, 489 F.2d 535 (2d Cir. 1973); *United States v. Tortorello*, 480 F.2d 764 (2d Cir.), cert. denied,

[Footnote continued on following page]

The Industries International fraud was all of this, and more, since the "shell game," as practiced by Mahler and Ubben, also involved bribery, perjury, forgery, fabrication and destruction of documents, and physical threats.

In broad outline, Mahler and Ubben and their numerous subordinates took secret control over a dormant public shell corporation and, using falsified legal documents, reorganized it with a tiny and destitute private company into "Industries International, Inc." Then, using false financial statements and a wide variety of oral and written misrepresentations, they proceeded to generate a strong demand for the stock of this worthless company, the bulk of whose tradeable stock they secretly controlled. Next, they bribed stockbrokers to trade the stock and drove the price from \$1 to \$7 per share in less than one month. As the price rose, they arranged, through further bribes, for their own stock to be dumped on the public. Only the early intervention of the Securities and Exchange Commission prevented them from disposing of all their stock; as it was, the loss to the public in the one month in which the stock traded exceeded \$1.4 million.

Some of the highlights of the Government's case, established through 20 witnesses and several hundred exhibits, are set forth below in roughly chronological sequence:

1. The Illicit Bargain

In October of 1972, Mahler and Ubben—having barely completed another shell game swindle involving the stock of HUP Industries, Inc.—met in a Manhattan hotel to

414 U.S. 866 (1973); *SEC v. North American Research & Development Corp.*, 424 F.2d 63 (2d Cir. 1970); *United States v. Schwenoha*, 383 F.2d 395 (2d Cir. 1967). For typical examples from other circuits, see, e.g., *United States v. Manning*, 509 F.2d 1230 (9th Cir. 1974), *cert. denied sub nom. Wooldridge v. United States*, 423 U.S. 824 (1975); *SEC v. International Chemical Development Corp.*, 469 F.2d 26 (10th Cir. 1972).

plot the Industries International fraud. Over the previous summer, Mahler (using the alias "Arnold Nelson") and his chief lieutenant, Theodore Zucker,* had acquired control, in nominee names, of most of the stock of a publicly-tradeable but defunct corporation, Bell-Ko Film Corporation, a "shell" whose assets totalled \$86. Ubben, meantime, had managed to get himself retained as "business consultant" for International Industries, Inc., a tiny, private company in Colorado, nominally the manufacturer of a "revolutionary" pneumatic industrial pump (the "Dri-Flo" pump) but virtually without sales and verging on bankruptcy. During a series of conversations, Mahler and Ubben agreed that they would "reorganize" these companies into a new corporation, "Industries International, Inc.," the bulk of whose publicly-tradeable stock would be secretly held, under nominee names, by Mahler, Ubben, and Zucker. Ubben would provide false financial statements showing the new company as having a net worth of several hundred thousand dollars and would tout the stock to investors and brokers in the Midwest area where he operated. Mahler, for his part, would arrange through bribable New York brokers for the stock to be publicly traded on the over-the-counter market (notwithstanding that it was unregistered stock and therefore prohibited from such public sale) and, once the market rose, would (in addition to cashing in on his own nominee stock) help Ubben dispose, through nominee names, of Ubben's share of the tradeable stock. After some argument over just how large that share was to be, the illicit bargain was sealed and the swindle got underway.**

* Zucker, who pleaded guilty prior to the first trial, was one of more than a half-dozen co-conspirators who testified as "inside" witnesses for the Government at the re-trial.

** At the end of each numbered section of this Statement of Facts are set forth references to some of the corresponding testimonial and exhibit evidence. The references for this first section are: *Tr.*: 106-112, 277-81, 364ff., 476-77, 776-789, 920-34, 1348-57, 1487-95, 1501-08, 1537-43; *GX*: 4, 39, 127, 293, 502-03, 516, 702,

[Footnote continued on following page]

2. False Financial Statements

As his first step in furtherance of the fraudulent scheme, Ubben set about in early November, 1972 to procure false financial statements that would conceal that Industries International was nothing more than a paper combination of a dormant shell (Bell-Ko Film) and a destitute Colorado "job-shop" (International Industries) and that would assist and provide a seeming justification for any subsequent rise in the company's stock. Informed that International Industries' outside accountants, the reputable Denver firm of Elmer Fox & Company, were preparing to report figures for the fiscal year ending September 30, 1972 that would show a loss and a net worth approaching zero, Ubben tried to induce Fox & Company to substitute, with "disclaimers, footnotes or whatever" (Tr. 510), grossly inflated figures wholly unsupported by the company's books and records. When Fox & Company told Ubben that this was improper and could not be done, Ubben got International Industries' president, Billy Lovejoy, to dispense with Fox & Co. and substitute a destitute, alcoholic accountant named Lawrence V. Bialek, whom Ubben described as an accountant who, "for \$500," would "put anything into a statement [Ubben] wanted." (Tr. 726-27).

For \$562, to be precise, Bialek, in less than a week's time, produced on his accountant's letterhead both an "unaudited" financial statement showing International

749, 806, 806A. "Tr." refers to the transcript of the re-trial before Judge Pollack and "GX" to Government Exhibits in evidence at that trial. Other abbreviations used in this brief are: "MBr."—Mahler's brief; "UBr."—Ubben's brief; "GApp"—Government's Appendix; "MApp."—Mahler's Appendix; "ITr."—transcript of first trial before Judge Frankel; "(date) Tr."—transcript of proceeding on date indicated; "R. Doc. #"—record on appeal, by document number.

Industries as having a tidy profit and a substantial net worth and also a "pro forma" financial statement showing the reorganization of International Industries and Bell-Ko into "Industries International" as creating a company with a net worth of no less than \$456,278 (GX 111). As Ubben well knew, these financial statements were flagrantly false. Bell-Ko was a shell; International Industries was operating at a loss, had few tangible assets and was unable to meet its obligations. The result of their combination, Industries International, should have been portrayed as having a sizeable loss and, at best, a net worth under \$20,000.*

3. The Sham "Reorganization": False Legal Documents

The next step in the fraud was to "reorganize" International Industries and Bell-Ko Film into the new company, Industries International, in such a way as to evade the federal registration requirements for the distribution of stock, concentrate a limited "float" (supply) of tradeable stock in a relatively few hands, and conceal Mahler's and Ubben's roles as the key persons in the distribution of the company's stock. To these ends, Mahler first had his attorney, Harold C. Herman, charter a new corporation, "Industries International, Inc." and cause it to issue 4 million shares of stock. 2.2 million of these were exchanged, on a 100 for 1 basis, for the existing 22,000 shares of International Industries, all of which had been in the hands of Billy Lovejoy and his relatives. This left 1.8 million shares, most of which were secretly controlled by Mahler, Ubben, and Zucker, under various nominee names.

* Evidentiary references for section 2 are: *Tr.*: 475-80, 493, 501-15, 531-32, 628-29, 681-82, 726-27, 1043-49, 1204-06; *GX*: 111, 127, 232, 233, 233A, 285, 286, 288, 289, 291, 299, 514, 544, 545, 546, 547, 629, 645A, 655, 656, 680, 809, 810.

Mahler's next move—and a key one—was to have Industries International acquire the “assets” of Bell-Ko Film by exchanging 664,000 shares of Industries International for the 664,000 shares of Bell-Ko Film in a manner that outwardly purported to comply with SEC Rule 133, a then-existing exemption from the federal registration requirements.* In actuality, and for a variety of reasons, the paper reorganization of Industries International and Bell-Ko Film could not possibly qualify for treatment under Rule 133. To mention just one disqualification, Rule 133 treatment was not available if the reorganization was intended as simply a step toward the sale of the surviving company's stock to the public; yet this was precisely what Mahler and Ubben had in mind. Indeed, Ubben began selling Industries International stock to the public in late November, 1972, several weeks before the purported “reorganization” even took place. But, with the benefit of Mahler's great expertise in this area,** the

* Former Rule 133 (17 C.F.R. 230.133), promulgated by the SEC pursuant to the Securities Act of 1933, provided, in substance, that if a public company was merged or reorganized with a private company under circumstances where no distribution of stock to the public was contemplated, no registration with the SEC was required for the merger or reorganization itself, and, moreover, the shares of the old public company could, if various specified conditions were fulfilled, become themselves publicly tradeable without any further registration or the disclosures incident to it. In practice, Rule 133 created a context in which “shell game” frauds could thrive; as Mahler himself was warned in early 1972, it was an area “fraught with the danger of fraud” (Tr. 1202, 1429). Largely for that reason, the SEC in the summer of 1972, rescinded the rule effective January 1, 1973. The Industries International fraud was one of the last, as well as one of the largest frauds perpetrated under cover of Rule 133.

** Mahler was the former president of a New York brokerage firm who, in the mid-1960's, had been barred from the brokerage business and twice convicted in this District of stock-fraud-related felonies (see Point I, below). At the end of his probationary term, he had entered the “mergers and acquisitions” business, specializing in “shell deals.”

swindlers created a large number of false legal documents to give the appearance of a valid Rule 133 reorganization.

For example, rather than obtaining the necessary approval of the acquisition of Bell-Ko from the Board of Directors of Industries International (most of whom, not being in on the scheme, would have voted against the acquisition), Mahler and Ubben ignored the Board until after the reorganization was completed; then, in January, 1973 (after Rule 133 had expired as well), Mahler's attorney Herman simply drew up, without the Board's knowledge, a false and backdated set of minutes (mailed to Mahler for his approval) reciting that the entire Board of Industries International had met at Herman's office on November 2, 1972 and approved the reorganization with Bell-Ko—none of which was true. Likewise, in conjunction with obtaining approval of the reorganization from those remaining Bell-Ko shareholders not under the swindlers' control, Zucker and Ubben prepared (from a form drafted by Mahler), and Mahler reviewed and approved, a false proxy statement (GX 4)* that not only contained the false Bialek financial statements but also totally concealed the fact that the actual organizers of this reorganization—Mahler, Ubben, and Zucker—controlled between them, under nominee names, over 35 percent of the stock of Industries International and over 60 percent of the only such stock that could be qualified for public sale under a Rule 133 reorganization. Indeed, so total was the concealment practiced in this proxy statement that not once in the entire 27 pages of the proxy statement did any of the names "Mahler" (or his alias "Nelson"), "Ubben", or "Zucker" appear, even though they were the persons who had put the reorganization together, controlled both sides of it, and stood to profit most by it. Yet this false proxy statement was

*The proxy ballots themselves were made returnable to "Harold C. Herman, Esq." at a post office box that was unknown to Herman and that was, in fact, Mahler's.

used not merely to create an appearance of compliance with Rule 133 but also to help get the stock listed for trading and to help tout the stock to the public.*

4. The False Touting and Fraudulent Inducements to Investors

The next step in the scheme was to artificially stimulate a public demand for Industries International's actually worthless stock. Primary responsibility for this part of the scheme fell to Ubben, who concentrated his efforts on the relatively small and unsophisticated community of Des Moines, Iowa, and, in particular, on the more prominent investors in that community. Between November of 1972 and the commencement of public trading in Industries International stock around March of 1973, Ubben managed to induce a number of such investors to purchase, at \$1 per share, several hundred thousand shares of Industries International stock,** with the result, as Ubben foresaw, that word spread rapidly through this close-knit community and many other, less wealthy investors became anxious to "follow the smart money" and "get in on the ground floor." Ubben accomplished all this through a wide variety of ruses and misrepresentations:

First: he and his subordinates told potential investors that the Dri-Flo pump had capabilities and prospects that they knew to be untrue. For example, they published and distributed a newsletter (GX 14) that said that Indus-

* Evidentiary references for section 3 are: *Tr.*: 105-18, 364-71, 376, 398-400, 407, 409-12, 433-36, 458-62, 515-17, 631-33, 637-41, 645-49, 682-83, 692-93, 706-07, 773-793, 839, 1022-27, 1043-49, 1172-73, 1200-1213, 1234, 1318-25, 1429-37; *GX*: 4, 39, 75E, 75F, 75G, 75P, 141, 288, 288A, 290, 293, 299, 318, 350, 456, 457, 465, 536, 629, 638, 702, 716, 746, 747, 749, 780, 781, 786, 787, 788, 794, 801, 801A.

** Four of these investors testified as Government witnesses at the retrial.

tries International was under contract with the federal government to pump coal at the Federal Center in Denver, whereas in fact, as they well knew, the pump had failed to pump coal at the Center and the company had had to use ordinary belt conveyors to fulfill its small contract there. Likewise, they distributed to potential investors a wildly unrealistic sales and earnings projection (GX 78) that projected gross pump sales of over \$3.7 million for Industries International's current year of operation, when, even by Bialek's figures, the company's gross pump sales for the prior year had been less than \$80,000.

Second: Ubben and his subordinates falsely represented that the proceeds from these sales of Industries International stock would go toward the production of the Dri-Flo pump. In actuality, the company itself received from these stock sales only so much as was necessary to pay enough of its overdue bills to keep the company from falling into immediate bankruptcy. At least 45 percent of the proceeds (and possibly much more) were funneled, through various dummy corporations, into the pockets of Ubben, Mahler, and their accomplices.

Third: Ubben promised these investors that, of every three shares they purchased at \$1 per share, he would arrange for one to be unrestricted, "free and tradeable" stock, which they could immediately re-sell once public trading commenced. This was patently fraudulent, since Ubben had no free-and-tradeable shares and had no reasonable expectation of obtaining any. What he did have was a convoluted, illegal plan (discussed at subsection 7, below) that he and Mahler had devised to turn some of his Bell-Ko shares into free and tradeable Industries International shares for these investors. When this plan failed and Ubben was unable to deliver a single free-and-tradeable share to any of these private investors, he did not apprise them of that fact, let alone return their money; he simply lulled them along with false repre-

sentations, such as that they would get their stock "next week" (GX 538).*

By such fraudulent means, a substantial demand for Industries International stock was artificially created among people in and around Des Moines even prior to the opening of the public market.**

5. Entering the Market: Bribes and False Statements to Brokers

At the same time, arrangements were being made in New York to have a brokerage house list Industries International for sale on the over-the-counter market. This was not a matter that Mahler and Ubben left to legitimate market forces; rather, they secretly bribed William Welens, a salesman at the marginal brokerage firm of P.J. Stanton & Co., to induce that firm to become a "market maker" in the stock (i.e., publicly list itself as available to buy and sell the stock of Industries International). The bribe took the form of 50,000 shares of restricted

* In addition to these misrepresentations, Ubben made further false statements that were "individualized" to an investor's particular situation or weakness. For example, for \$75,000 Ubben and Lovejoy sold to a prominent Des Moines homebuilder named Dean Skeie certain marketing rights to the company's pump that Ubben and Lovejoy had already sold, just 24 hours earlier, to a company called Tote. When Skeie discovered the fraud, Ubben and Lovejoy placated him by backdating the agreement giving Skeie his marketing rights (GX 142) to September 2, 1972 (which was before they had ever met). In return, Skeie paid them an additional \$50,000.

** Evidentiary references for section 4 are: Tr.: 529, 545-46, 597-604, 610-14, 617-23A, 625-27, 682-96, 705-07, 733, 945, 1022-38, 1052-78, 1090, 1534-37, 1541-44; GX: 14, 16, 23-28, 76-78, 80, 92, 95-97, 111, 117, 133, 141, 142, 158, 177-85, 194, 198, 200, 211, 217, 219, 220, 244, 249, 268, 293, 294, 328, 331, 333-335, 337, 345, 348, 349, 380, 437, 438, 442-44, 449, 465, 477, 487-490, 502, 510, 519, 523, 536-40, 636-41, 644, 692, 693, 702, 711, 738, 747, 749, 793, 795, 801-04, 801A-04A, 808, 808A.

Industries International stock.* To conceal its true purpose, Mahler and Ubben arranged to have the stock funneled from the company to one Louis Kulekofsky (a "financial consultant" who was both a friend of Wellens and the husband of Mahler's "girl Friday") ostensibly as a fee for fund-raising services performed by Kulekofsky on behalf of Industries International. Kulekofsky, in turn, was to give to Wellens half the proceeds from any disposition of the stock.

To induce other brokers to enter the market once Stanton & Co. had opened the way, the swindlers arranged a "free cocktails" meeting for over-the-counter brokers at the Coachman's Restaurant in downtown Manhattan on February 7, 1973. At this meeting, each broker was given a packet of materials about the company (GX 16) that included, *inter alia*, the false proxy statement with the false Bialek financials (GX 4) and a new, updated financial statement, seemingly on the letterhead of a Denver firm called "Dalby & Associates" (GX 117). This new financial statement, which falsely purported to show Industries International in better financial shape than ever, was actually a total fabrication:** at Ubben's instance, the internal bookkeeper at Industries International, David Norblom, had added still further inflated figures to the already inflated Bialek figures and then placed them, without permission, on paper he had bor-

* Although restricted from immediate resale, such stock typically would acquire value (e.g. as collateral for loans) as the market price of the unrestricted stock rose.

** Notwithstanding the fact that some of the proceeds from Ubben's "private" sales of stock had gone to Industries International, the company's already terrible financial position was steadily deteriorating throughout the early months of 1973, as the result of continuing overhead and virtually no sales. For the period between September 30, 1972 (as of when Bialek issued his initial financials) and July 31, 1973 (when the company effectively ceased operations), the company lost over \$345,000, and its net worth as of the latter date was *minus* more than \$150,000.

rowed from a friend at Dalby & Associates.* Also at the Coachman's meeting, the brokers were treated to speeches by Ubben and Lovejoy and a tape-and-slide presentation about Industries International ("offering revolutionary products to a waiting world"). Among numerous other misrepresentations, the brokers were told that, while "projected sales for the Dri-Flo pump for calendar year 1973 are \$3,900,000, early response indicates that the estimate is very likely too low." In actuality, the company had not sold a single pump in the last quarter of 1972, had over the previous two years sold only 18 pumps (a number of which had been returned as unworkable) for a total of less than \$150,000 gross sales, and had virtually no pending commitments at all for sales of pumps.

The day after the Coachman's meeting, Wellens had P.J. Stanton & Co. submit an application to list Industries International in the "pink sheets" (national daily quotations furnished to over-the-counter brokers). Needless to say, the application did not disclose the bribe. On the same day (February 8, 1973), Wellens met in a Manhattan hotel room with Mahler and Ubben and received from them a list of "Bell-Ko" shareholders from whom he could obtain stock, "freed up" under Rule 133, in order to meet any incoming demand once trading opened. Wellens recognized some of the names as Mahler nominees. After some delay, Stanton & Co.'s application was duly processed, and the "pink sheets" for February 28, 1973 listed, for the first time, the stock of Industries International.**

* Norblom went even a step beyond what Ubben required and forged the signature "Gordon C. Dalby" to the cover letter accompanying the fabricated financial statement.

** Evidentiary references for section 5 are: Tr. 99, 104, 108-24, 172-73, 178, 186, 190, 267-68, 271-72, 276-92, 309-310, 470-77, 501, 517-26, 528-30, 550-558, 623A, 697-702, 730-31, 775-78, 792-94, 929-930; GX 4, 6, 16, 117, 282, 285, 286, 288-91, 394, 396, 431, 432, 514, 544, 545, 629, 721-23, 738, 743-45, 745A, 749, 809, 810.

6. Manipulating the Market and Dumping the Stock: Rigged Trades and More Bribes

On the day trading opened (February 28, 1973), Industries International stock traded at \$1 per share. But since the demand that the swindlers had fraudulently generated in Des Moines could only be met through the limited supply of "Rule 133 stock" that the swindlers effectively controlled out of New York, Mahler and Ubben could, within limits, fix the price as they chose. Fix it they did: more specifically, within the single week of March 2-8, 1973, the price of this worthless stock rose to nearly \$5 per share, with most of the buying originating in Des Moines and most of the selling originating in New York; and, in the same week, Ubben, and Zucker, using nominee names, dumped no less than 80,000 shares on the market in rigged transactions from which they realized spectacular personal profits.

To "free up" for public sale these 80,000 shares, which were held in three nominee blocks, Mahler had his attorney, Harold Herman, prepare three opinion letters, based on fraudulent representations provided by Mahler, directing the transfer agent to remove the restrictive legend on all 80,000 shares. Mahler and Zucker then placed two of the blocks, totaling 40,000 shares, in nominee accounts at tiny local brokerage houses. Then, by prearrangement with Kulekofsky and Wellens, whenever sufficient orders to buy stock were received by P.J. Stanton & Co. from brokerage houses in Des Moines, a portion of those orders were filled with stock then purchased from these nominee accounts. In this way Mahler and Zucker realized over \$130,000 profit from these 40,000 shares. Kulekofsky and Wellens received \$10,000 in cash bribes for their assistance in rigging these sales.

In a similarly rigged, but more complicated fashion, the third block of stock, which consisted of 40,000 shares in the name of Marvin Greenberg, was disposed of in a

manner designed to secretly funnel proceeds both to Mahler and Zucker in New York and to Ubben in Des Moines. In brief, the stock was first sold from a New York brokerage account opened in Greenberg's name to a New Jersey account in the name of "Anted Vending Company," actually just another nominee for Mahler and Zucker. The sale was consummated at \$0.50 per share, at a time when the market was nearing \$4 per share, so as to funnel cheap, "freed-up" stock into Mahler's and Zucker's hands. From there, 35,000 shares were sold at another rigged price of \$2 per share (still well below market) to a nominee account in Des Moines ultimately under the control of two Ubben associates, who were supposed, in turn, to sell off the stock at the inflated market price and kick back a portion of the proceeds to Ubben. When, because of unforeseen occurrences such as the suspension of trading of the stock, these associates were only able to kick back \$10,000 to Ubben, Mahler and Zucker funneled \$30,000 of their own proceeds through no less than three nominee bank accounts into Ubben's hands. As for the remaining 5,000 shares, these, together with \$18,000 in cash, went to Kulekofsky and Wellens as further bribes for their help in rigging these various trades.

Mahler, Zucker, and Ubben had plans to dump still more Industries International stock on the market (see section 7, below), but the swift rise in the stock's price had caught the attention of the SEC. On the afternoon of March 7, 1973, after only six days of actual trading, an SEC investigator walked into P.J. Stanton & Company and asked to see the company's trading records regarding Industries International. Alerted that evening, Mahler and Zucker thereafter largely refrained from trying to "free-up" and dump any more stock on the market; instead, they set about devising a "cover-up" (discussed in subsection 8, below) for the rigged trades in which they had already been involved. With the main

sources of supply of the stock thus cut off, the price of the stock, fed by the Des Moines demand, continued to rise, reaching almost \$7 per share, until the SEC finally developed sufficient information to suspend trading of the stock, on March 27, 1973. By the time the suspension was lifted, the company, evidencing its true worth, had filed for bankruptcy and the stock never again traded. Hundreds of investors, of all economic levels but chiefly from Des Moines, were left with losses exceeding \$1 million from just this one short month of trading (not to mention the hundreds of thousands of dollars lost by those who purchased in Ubben's "private" sales).*

7. The Abortive Plan to "Free-Up" More Stock: Nominees and Forgeries

Of the "Rule 133 stock" originally divided among Mahler, Ubben, and Zucker (see section 1, *supra*), Ubben's "cut" had been 180,000 shares. From this sizeable block, Ubben intended to "free up" enough shares to give free-and-tradeable shares to his "private" investors (see section 4, *supra*) and to sell the remainder into the market for his own benefit. But since Ubben could not qualify under Rule 133 to free up such stock, he placed the stock in the names of no less than six nominees (four of whom testified as Government witnesses at trial). Some of these (such as Dean Ubben's niece, Donna Brighton, and her

* Evidentiary references for section 6 are: *Tr.*: 125-151, 161-170, 195-201, 268-71, 289, 292-302, 318-34, 342-43, 358-59, 377-89, 557-59, 563-74, 577, 589-92, 604, 617-21, 701-07, 711-14, 780-87, 794-803, 807-11, 1016, 1042-49, 1076-90, 1550-54, 1619-24; *GX*: 10, 15, 17-19, 25, 27, 47, 65, 66, 73, 75E, 75H, 75P, 83, 84, 97, 100-08, 163-76, 186, 190-200, 207, 208, 217-220, 270, 273, 279, 281, 284A-284G, 292, 293, 313, 319, 355, 360, 362-66, 369-72, 424, 425, 465, 510A, 561, 562, 572, 615, 617-19, 622, 622A-622E, 630-34, 636, 671, 672, 677-79, 681, 684, 685, 689, 690, 698, 710, 713, 720, 749, 759, 772-75, 777, 805, 805A, 805B, 805A-1, 805B-1, 805AA, 806, 806A.

girl-friend, Phyllis Kaisner Weiss) were induced to act as Ubben's nominees, and to sign false documents concerning their ownership of the stock, by a combination of bribery and deception on Ubben's part. In other cases, when the prospective nominees—such as Ubben's grandniece, Diane Johnson, and a relative of Billy Lovejoy's, Lorraine Thorpe—flatly refused to join in Ubben's illegal scheme, he simply went ahead and used their names anyway, wholly without their permission or knowledge.

Even with the stock in nominee names, it could not be "freed up" for public sale without an opinion letter from an attorney directing the transfer agent to remove the restrictive legend from the stock certificates. Ubben and Mahler apparently believed that Harold Herman, who was preparing the opinion letters for the 80,000 shares discussed in the previous section, would do the same for this further block of 180,000 shares. But Herman balked, and agreed only to prepare a form letter for the freeing-up of such shares, to be sent to C. Mert Reese, a Denver farmer and part-time attorney who had done some previous work for Ubben and Lovejoy, including preparing backdated documents. Reese, however, likewise refused to sign such letters or be part of the scheme. So Ubben ultimately resorted to forging Reese's signature on six separate opinion letters (GX 622E) purporting to free up the 180,000 shares of stock on the basis of false representations falsely attributed to the six nominees.

Ubben then sent these false and forged opinion letters to the transfer agent for Industries International stock, together with requests that the restrictive legend be removed from the stock. The letters however, reached the transfer agent after the SEC's investigation had become public knowledge, and the transfer agent, who had been given legal advice not to free-up any more stock, accordingly rejected Ubben's request. Had this additional part of the fraudulent scheme succeeded and the 180,000 shares been sold to the public at the prevailing market price of

\$7 per share, an additional \$1,260,000 loss would have been inflicted on the public.*

8. The Cover-Up: Fabrications and Perjuries

The SEC investigation not only prevented the swindlers from dumping more stock on the market and realizing further fruits of their fraudulent scheme, but also caused them to resort to still further fraudulent actions to conceal the scheme from the investigating authorities. Mahler and Zucker early concluded that their chief vulnerability to exposure lay in connection with the disposition of the 40,000 shares originally in the name of Marvin Greenberg, since both of the sales of this stock—the first from Greenberg to their nominee “Anted Vending” account at a price of \$.50 per share and the second from Anted Vending to the Ubben-connected account in Des Moines at \$2 per share—had been so far below the market as to attract the attention of any experienced investigator. Knowing that they could not wholly divorce themselves from “Anted Vending” (since, for example, they were the only signatories on the Anted Vending bank account), they decided to pretend that Anted Vending had another officer who had been responsible for the trades in Industries International stock.

To this end, they got a friend of Zucker's, one Michael Sichel, to agree to pose as the corporate secretary of Anted Vending Company, to pretend that he was an old

* Evidentiary references for section 7 are: *Tr*: 379-86, 576-77, 633-34, 957-61, 967-75, 978-83, 985-93, 1038-41, 1212, 1540-42, 1548, 1604, 1607-19; *GX*: 538, 622B-E, 705, 706, 709, 789, 806, 806A.

acquaintance of the New Jersey broker (Michael Dutzar) who handled the Anted Vending account, and to say that it was Dutzar who induced him to trade the stock. A false and backdated letter was prepared on Anted Vending stationery and signed by Sichel, in which Sichel indicated to Dutzar, well before the opening of trading, his interest in what Dutzar had purportedly told him about Industries International stock; Mahler even went so far as to rig the postage meter in his office so that the envelope on the letter would carry an appropriately backdated stamp. Similarly, Sichel executed false brokerage account cards for Anted Vending, and these were substituted for the original forms signed by Mahler and Zucker, which were then destroyed. Finally, Dutzar, who was called to testify before the SEC, was counseled by the swindlers to give false testimony attributing the Anted Vending account to Sichel.

Similarly, in order to account for the fact that the attorney's opinion letter "freeing-up" the stock for Greenberg had been written by Mahler's attorney, Harold Herman, at a time when Herman had never so much as spoken to Greenberg, Mahler instructed Herman to lie and say that he had met Greenberg in New York prior to the start of public trading of the stock and that Greenberg had thereafter asked Herman to write the opinion letter. Herman thereupon went before the SEC and lied as Mahler had bidden him to.*

* Evidentiary references for section 8 are: *Tr.* 143-45, 247-52, 390-93, 421-23, 462, 802-06, 901-10, 994-1002, 1081, 1282-96, 1380, 1395, 1464-65; *GX*: 17, 43, 46, 47, 83, 84, 100-08, 193, 612, 613, 672-78, 805AA, 805B-1.

9. The Denouement: Threats and Separations

Still another consequence of the SEC investigation was, eventually, to split the swindlers apart as each one sought self-protection. Mahler, moreover, used the SEC investigation as an excuse for trying to hold on to more than his share of the fraudulent proceeds, claiming that it was the SEC's detection of his paying bribes that, as he put it to Zucker and Kulekofsky, "got [him] in trouble last time" (Tr. 147, 152). Kulekofsky and Mahler had two heated arguments in March and early April about this, at the end of which Mahler caved in and agreed to pay Kulekofsky what he and Wellens were still owed on their bribes. Similarly, Mahler tried to avoid paying Ubben the last \$30,000 due him, even refusing to take Ubben's phone calls. Thereupon Ubben (a physically large man) called Kulekofsky and told him to convey to Mahler a number of physical threats, including that he (Ubben) would come to New York and personally "break [Mahler's] legs." (Tr. 151). Mahler then paid up. Ultimately, even Mahler and Zucker split up in acrimonious quarrels as to who was to blame for the SEC's investigation, which continued over several years until the entire fraud was unearthed.*

* Evidentiary references for section 9 are: *Tr.*: 147-52, 253-57, 270, 807-11, 1014, 1195-97, 1386-91, 1620; *GX*: 15, 97, 805B-1.

Defense Case

Since the defense case is set out at very great length in the briefs of Ubben and Mahler,* and at any rate was rejected by the jury, it will only be touched on here. Mahler denied criminal knowledge and intent; he claimed to have been absent when some of the rawer acts in furtherance of the scheme (such as the bribing of brokers) were taken, and he denied knowing that others acts, participation in which he conceded, were part of a scheme to defraud. He claimed that the primary Government witnesses against him were engaged in a perjurious plot to place the blame on him and that, because of his prior convictions, the Government was all too ready to credit them.

In support of this defense, Mahler called five brief witnesses as well as himself. Charles Hecht, an attorney who represented Mahler in certain shell reorganizations prior to Industries International, testified (Tr. 1169-1234) that, precisely because of his former convictions, Mahler was always careful to comply with the securities laws, but that his associate, Zucker, was not, and that it was Zucker's untrustworthiness that finally led Hecht to terminate his representation of Mahler in these reorganizations.** Nathan Brodsky, the owner of one of the nominee corporations used for the surreptitious transfer of \$30,000 from Mahler's and Zucker's account to Ubben's, testified (Tr. 1248-81) that the check in question was made out by him at Zucker's, not Mahler's, re-

* Indeed, even the section of Mahler's Brief entitled "The Government's Case" (MBr. 3-16) reads suspiciously like the defense case, and certainly bears not the slightest resemblance to the Government's proof taken most favorably to the Government (as it must be on this appeal).

** Hecht's testimony is discussed in more detail in Point II, *infra*.

quest, and that most of his contact was with Zucker. Michael Dutzar, who had pleaded guilty to giving false testimony to the SEC as part of the cover-up, testified (Tr. 1282-96) that he took his directions, as to both the cover-up and the rigging of the sale of the "Greenberg" stock, from Sichel, Kulekofsky, and a man named Zitofsky, rather than from Mahler or even Zucker. Joseph Pettineo, a speculator who had acquired some Bell-Ko shares around 1969, testified (Tr. 1298-1313) that after Bell-Ko was reorganized into Industries International, he sold this stock at a substantial profit.* Brenda Mahler, the defendant's wife, testified (Tr. 1483-95) that Mahler was present with her at a birthday party for their son until 9 p.m. on one of the evenings when Kulekofsky and Zucker claimed to have met with Mahler to discuss the cover-up.

The great bulk of Mahler's defense, however, consisted of his own testimony, in which, over some 168 pages of testimony (Tr. 1314-1482), he elaborated his defense along the lines indicated above. The jury thus had ample opportunity to assess his credibility as well as his claims of lack of knowledge and intent. For example, Mahler claimed that he was away in Africa during the period (December 5-15) when the proxy statement (GX 4) was prepared and mailed to shareholders and that, in any event, he was unaware of any requirement that the persons who controlled the shell had to disclose that ownership. But on cross-examination he was confronted with his passport, showing his departure from Africa on December 5, and checks both signed and endorsed by him and dated at various dates in the December 5-15 period. He was also confronted with Hecht's

* Presumably this testimony was offered to support Mahler's defense of lack of criminal intent by showing that not all those who sold their old Bell-Ko stock following the reorganization with Industries International were engaged in a fraudulent scheme.

testimony, given just a few days earlier, in which Hecht said that he had apprised Mahler of the need to disclose in such proxy statements the persons who controlled the shell.

Similarly, Mahler testified that Zucker, Wellens, and Plew (Ubben's chief lieutenant, who pleaded guilty and testified for the Government) had all lied when they claimed that he and Ubben had met on February 8, 1973 (the day when Stanton & Co. submitted its application to trade the stock) and arranged for the rigged transfer to Ubben of the 40,000-share "Greenberg" block of stock. Indeed, Mahler went further and testified that he never had any dealings with Ubben between December 18, 1972 and the start of the first trial of this case in 1977. This was contradicted not only by the Government's witnesses but also by GX 510A, a check from Dean Ubben, dated February 8, 1973, made out to "Marty Greenberg" but endorsed (in that name) in Mahler's writing and deposited into a corporate account of which Mahler was the sole signatory. Moreover, after Mahler left the stand, Ubben testified and flatly admitted meeting and dealing with Mahler in the early months of 1973. Ubben also testified that, as between Mahler and Zucker, it was Mahler who took the lead. Given Mahler's performance on the stand, Judge Pollack had no difficulty in concluding, at the time of sentence, that "It is absolutely clear beyond a reasonable doubt that the testimony that the defendant [Mahler] gave on the witness stand was perjurious, intentionally, deliberately, and with a wrongful motive." (December 8, 1977 Tr. 28).

Ubben's defense consisted entirely of his own testimony, which, like Mahler's, covered 168 pages (Tr. 1456-1624). His defense was one of lack of fraudulent intent and, more positively, a "good faith" belief in the various representations he had made. Since approximately a dozen Government witnesses had quoted him as making

one or another unambiguously fraudulent statement, he denied the accuracy of their testimony, one by one, claiming they had either lied or had "misunderstood." However, on cross-examination, Ubben effectively confessed his guilt. For example, he admitted (Tr. 1607-1620) that the six opinion letters (GX 622E) that had been mailed to the transfer agent to try to "free-up" 180,000 shares of stock in six nominee names had been prepared at his direction so that he could obtain the "free-and-tradeable" stock he had already sold to private investors and that "at the time the papers were prepared, they would have been false, yes." This was tantamount to an admission that he had schemed to obtain money and property by knowingly false pretenses, the gist of the charge in most of the counts of the Indictment.

A R G U M E N T

POINT I

Mahler's Prior Convictions Were Properly Introduced As Similar Act and Impeachment Evidence.

Mahler contends that the District Court abused its discretion in permitting the Government to introduce evidence of Mahler's prior convictions as similar act and impeachment evidence. Thus, Mahler suggests that while he was entitled to defend this case on the theory that he lacked criminal knowledge and intent and to take the stand in support of that defense, the Government was not entitled to elicit exceedingly probative evidence of either his criminal intent or his untrustworthiness as a witness. Judge Pollack's rulings admitting this evidence appropriately permitted the jury to evaluate Mahler's defense and his credibility against the enlightening facts that he previously had engaged in a virtually identical stock fraud, had committed perjury, and had been convicted for so doing. Far from being an abuse of

discretion, these rulings were correct and were properly based on the District Court's sound conclusion that the combined probative value of Mahler's prior convictions as both similar act and impeachment evidence vastly outweighed any possible prejudicial effect, which in the express finding of the trial judge was "virtually nil." (Tr. 670).

A. Mahler's Prior Convictions Were Properly Introduced As Similar Act Evidence

In 1965, Mahler was convicted by a jury in this District both of conspiring with his accomplices in a stock fraud scheme to lie to the Securities and Exchange Commission ("SEC") and of giving false testimony under oath to the SEC.* In 1967, he was convicted again (this time by guilty plea) of six counts of stock fraud and one count of conspiracy to commit stock frauds.** Together, these convictions constituted a demonstration beyond a reasonable doubt that Mahler—the lead defendant in both cases—had participated in a securities fraud scheme and cover-up exceedingly similar to the present case.

Specifically, in 1964, Mahler arranged for a New York over-the-counter brokerage firm of which he was then president, Broadwall Securities,*** to tout and mar-

* *United States v. Mahler et al.* [5 defendants], 65 Cr. 400 (S.D.N.Y.). The essential facts underlying this case are set forth in the opinion of this Court affirming the conviction: *United States v. Mahler*, 363 F.2d 673 (2d Cir. 1966).

** *United States v. Mahler, et al.* [11 defendants], 65 Cr. 698 (S.D.N.Y.). The basic outline of this case is set forth in the opinion of this Court affirming the convictions of some of Mahler's co-defendants: *United States v. Light, et al.*, 394 F.2d 908 (2d Cir. 1968).

*** See *SEC v. Broadwall Securities, Inc.*, 240 F. Supp. 962 (S.D.N.Y. 1965) (McLean, J.).

ket the unregistered securities of two nearly defunct companies in return for undisclosed bribes. Mahler and his accomplices fraudulently stimulated a demand for the stock through false and misleading representations, including false financial statements on a CPA's letterhead. Thereafter, Mahler arranged to have Broadwall Securities list the stocks in the "pink sheets" and then manipulate the price upward. As the price rose, large blocks of stock secretly controlled by the conspirators were dumped, through Broadwall Securities, onto the public. A portion of the proceeds was then secretly kicked back to the brokerage employees as their bribes for doing the deal. These undisclosed kickbacks were actually made by Mahler in cash, but were concealed on the books and records of Broadwall Securities through various subterfuges, including, ultimately, the destruction of records. When the SEC began investigating the scheme, Mahler gave the employees a false "cover-up" story to tell the SEC, which he repeated himself under oath.

Mahler's central role in this prior scheme, as well as his ultimate admission of intentionally participating in virtually every aspect of it, cast grave doubt on any claim by Mahler that he was unaware of what was transpiring in the very similar factual pattern of the Industries International fraud. In such situations, as this Court has said, the jury is fairly entitled to know such proof so that it can assess "the sheer improbability that a person with [the defendant's prior] familiarity and experience with the specific criminal conduct charged might have been unaware that a crime was being committed or might have performed the acts with an innocent and lawful intent." *United States v. Klein*, 340 F.2d 547, 549 (2d Cir.) (Medina, J.), *cert. denied*, 382 U.S. 850 (1965).

Accordingly, when, as a result of the first trial of the Industries International case, the Government became aware that Mahler's primary defense was a claim of lack of criminal knowledge and intent,* the Government, on July 29, 1977 (two-and-a-half months before the retrial), advised Mahler and the Court of its intention to introduce proof of this prior scheme on its direct case at the retrial. Specifically, the Government proposed to introduce the two prior indictments (GX 780, 786), which between them summarized the overall scheme; the two prior judgments of conviction (GX 781, 787), which established that Mahler had participated in the scheme with requisite knowledge and intent; and finally the transcript of Mahler's own testimony (GX 788), as a Government witness following his guilty plea in the second case, in which he set forth in detail his own particular role in this prior scheme and the knowledge and intent with which he had acted.

Shortly before the retrial, both sides filed extensive legal papers for and against the admission of this evidence. Mahler's papers, which included an affidavit from the defendant himself, conceded that a claim of absence of criminal "knowledge will be the thrust of the defendant's defense" (Affidavit of Arnold Nelson Mahler, October 5, 1977), but contended that the probative value of the convictions was outweighed by their prejudicial effect. Following a brief oral argument, Judge Pollack ruled preliminarily that he was inclined to let the Government

* As Mahler, a former law school student who represented himself during much of the first trial of this case, stated in his *pro se* summation at the first trial: "I have not participated in any fraud at any time with any knowledge or any intent in this transaction." (ITr. 6202; emphasis supplied).

present this proof, but cautioned that "I haven't decided that finally . . ." (October 6, 1977 Tr. 5).*

Trial commenced on October 11, 1977. At the outset, Mahler's counsel made clear to the jury that his defense would center on an alleged absence of criminal knowledge and intent (Tr. 31-37), as well as an attack on the credibility of those who accused Mahler of participating in the Industries International "reorganization" with unlawful intentions and purposes (Tr. 33, 38-40). Thus, as the Government proceeded to put on its case, the thrust of considerable defense cross-examination centered on trying to establish that the actions taken in furtherance of the fraud could have been done innocently or that Mahler could have been ignorant of the fraudulent purpose to which they were being put by his associates.**

On October 19, 1977, after the great bulk of the Government's case had been introduced, the Government formally offered the aforementioned similar act proof. Mahler's trial counsel once again argued against its admission, but the Court ruled in favor of its admissibility, stating: "In my judgment, as this case has developed there will be no prejudicial impact that outweighs the probative value of the evidence, particularly in view of the nature of the several cross-examinations that have been conducted." (Tr. 665). Mahler's counsel then argued against the form of the proof, urging that the Government should be limited to putting in Mahler's prior convictions alone and not permitted to also read his prior testimony in which he elaborated the facts

* Judge Pollack had made similar written rulings on September 26 and September 29, 1977, following the receipt of the first two of Mahler's three sets of papers on this issue and the corresponding Government reply papers. See R. Docs. 71, 73.

** *E.g.*, Tr. 234-36, 303-04, 310-11, 340-58, 403, 446-51, 560-62, 578-85, 715-20.

underlying those convictions.* After deliberating over the matter during the luncheon recess, Judge Pollack, in an excess of caution, personally redacted from the transcript all but those portions having the most direct bearing on the question of similarity of knowledge and intent. Of the 75 pages of Mahler's direct testimony, the Court eliminated no less than 55, leaving just 20 that were read to the jury (Tr. 744-64; MApp. 126-147). That this succeeded in reducing what was given to the jury to the bare bones of what was necessary and appropriate for their understanding is shown, among other ways, by the fact that Mahler's counsel did not interpose a single objection to the form of the transcript as it was read to the jury, limiting himself, instead, to his original claim that it should not have been read at all.**

Against this background, Mahler's appellate claim is that: "The evidence regarding Mr. Mahler's prior con-

* This was nothing but an obvious ploy to handicap the jury, since without the transcript describing Mahler's own particular role in the prior scheme, the jury would have had a less adequate basis for comparing the similarity of his knowledge and intent to the knowledge and intent he was charged with in the instant case. Cf. *United States v. Morrow*, 537 F.2d 120, 141, n.31, 147 (5th Cir. 1976). Indeed, this position was 180 degrees opposite to the position Mahler had taken on this issue some two weeks earlier. At that time, both in his papers and in oral argument (see, e.g., October 6, 1977 Tr. 4), Mahler's counsel had argued that, rather than being entitled to introduce Mahler's prior convictions, the Government should have to call live witnesses and re-try the entire prior scheme—an approach that could only have created genuine confusion and waste of time by creating a "trial within a trial."

** Mahler's brief attempts to minimize the careful attention which Judge Pollack gave to this matter by stating that, "The court ordered that the transcript be redacted to contain only Mr. Mahler's testimony" (MBr. 35 n. 54). This is grossly misleading. The entire exhibit consisted only of Mahler's testimony. The 55 pages redacted from this by the District Court were, in the Court's view, less directly relevant as similar act proof than the 20 pages which were left to be read. (The original copy of GX 788 contains the Court's pencil markings, indicating its redactions.)

victions introduced by the Government in its direct case was *so complex, confusing, and prejudicial* that the trial court should have been *compelled* to exclude it." (MBr. 29; emphasis supplied). In so stating his claim, Mahler tacitly concedes, as he must, that the questions of knowledge and intent were very much in issue and that this similar act proof had probative value bearing on these issues.* He limits his claim to the narrow contention that proof in the form of the prior testimony was "confusing," plus a generalized claim that this similar act proof overall was, in some unspecified way, "prejudicial." **

As to the claim of confusion, in truth the introduction of Mahler's prior testimony added no confusion to the trial at all. Indeed, this testimony clarified the basis for the prior convictions and their relevance to the issues

* The similar act evidence also bore on such other closely related and contested issues as plan, preparation, and absence of mistake or accident, as to which it was likewise received. (Tr. 741). Moreover, evidence of Mahler's prior stock fraud was intertwined with evidence of the instant fraud and was admitted without objection when revealed to the jury in that context. Specifically, the Government's proof showed that Mahler went to great lengths to funnel bribes to brokers through multiple intermediaries in part because he believed that it was his direct and personal payment of the bribes to brokers in the prior stock fraud that had enabled the Government to catch and convict him. (Tr. 147, 152). As Judge Weinstein observes: "At times it may be quite impossible to prove the case without revealing other crimes. The court cannot 'fragmentize the event under inquiry.' If an understanding of the event in question, or if a description of the immediate circumstances, reveals other crimes than those charged, exclusion will lead to a highly artificial situation making understandable testimony unlikely." 2 Weinstein, *Evidence* at 404-45 (1975) (footnotes deleted).

** Thus he states: "Our point here is not that the Government's evidence contained in these twenty-one pages [of prior Mahler testimony] was wholly lacking in probative value. It is rather that the reading of this prior testimony generated such confusion that it served to maximize the prejudicial impact of the prior convictions and diminish whatever evidentiary value they might have had." (MBr. 33-34).

of knowledge and intent in the present case. Of course, the transcript presented the jury with new names and dates, though not nearly so many as Mahler's brief implies (MBR. 32-33); those names and dates, however, were unimportant for the purposes for which the jurors had been told they were to examine this proof. What was important—and vividly clear—was that Mahler, in his very own testimony, sketched out a prior fraudulent scheme that was remarkably similar to the one in issue and flatly admitted his central role in it. In particular, the transcript, as redacted, focused on Mahler's payment of undisclosed cash bribes to brokers to market certain securities—precisely the aspect of the Industries International fraud as to which Mahler most vehemently claimed ignorance and innocence. On this key issue of bribes to brokers, the prior testimony is simple and straightforward. For Mahler to claim on appeal that the evidence was hopelessly confusing—particularly when at trial he chose not to do so after Judge Pollack had carefully redacted the transcript—is mere rhetoric.*

* Even if the jury were left in any doubt whatsoever as to the meaning and purport of this similar act evidence, the doubt was removed later at trial when Mahler testified. For example, Mahler was asked these questions regarding the stock frauds underlying his prior convictions (in comparison with the Industries International scheme):

- “Q. They also involved cash bribes and kickbacks?
- A. I will eliminate the word ‘also.’ That’s correct.
- Q. And indeed the charge against you, in part, was that you paid cash kickbacks to your employees?
- A. That is correct.
- Q. And they also involved prearranged sales of stock?
- A. They involved prearranged sales of stock, that is correct.
- Q. Illegally prearranged sales of stock?
- A. Correct.
- Q. And it also involved rigged prices?
- A. Correct.
- Q. And it also involved back-dated records?
- A. Yes, sir.
- Q. In fact, you yourself back-dated some of those records, didn’t you?
- A. Yes, I did.” (Tr. 1425-26).

Without this claim of "confusion," Mahler is left with only his conclusory claim of "prejudice". As to this, Judge Pollack, just prior to the actual introduction of this proof, re-examined the record, the exhibits, even the "intangibles" in the case, took note of the fact that Mahler's prior convictions were not the sort to "inflamm[e] the jury," and, after weighing all the factors, concluded that the probative value of the prospective evidence greatly outweighed any tendency to create unfair prejudice (Tr. 670-71). As Judge Friendly stated for this Court in *United States v. Leonard*, 524 F.2d 1076, 1092 (2d Cir. 1975), *cert. denied*, 425 U.S. 958 (1976):

"[T]he weighing of the probative value of the evidence against its potentially prejudicial effect is primarily for the trial judge, who has a feel for the effect of the introduction of this type of evidence that an appellate court, working from a written record, simply cannot obtain. We said in *United States v. Ravich*, 421 F.2d 1196, 1203-04 (2d Cir.), *cert. denied*, 400 U.S. 834 (1970), citing *Cotton v. United States*, 361 F.2d 673, 676 (8th Cir. 1966) and *Wangrow v. United States*, 399 F.2d 106, 115 (8th Cir.), *cert. denied*, 393 U.S. 933 (1968), that 'his determination will rarely be reversed on appeal.'"

Mahler's brief lamely contends that this fundamental doctrine, is "no answer" to his claim. (MBr. 35). However, in apportioning functions between trial and appellate courts, federal jurisprudence has long recognized that the broad balancing of "prejudice" against "probative value," in which so many intangibles are involved and on which reasonable men may readily disagree, is a matter on which the trial judge, with his feel for all the interacting elements of the ongoing trial, is properly vested with unusually broad discretion. Only very recently this entire Court, in *United States v. Robinson*, 560 F.2d 507, 514-515 (2d Cir. 1977) (*en banc*) had occasion to reaffirm these principles, holding that the trial court's decision in

such matters will not be disturbed on appeal unless the trial court has acted "arbitrarily" or "irrationally".

Moreover, the standard to be applied by the trial court in exercising this discretion with respect to similar acts is one strongly favoring the admissibility of such evidence. As Mahler's Brief recognizes (MBr. 29, 34), the standard is governed by Federal Rules of Evidence 404(b) and 403. Rule 404(b) provides that "evidence of other crimes," while not admissible to prove the "character" of a person, "may" be admissible for other purposes, such as proof of "intent, preparation, plan, knowledge, . . . or absence of mistake or accident." The framers of the rule—intending that it codify the so-called "inclusory" view of similar act evidence favoring its admission—then put the following gloss on the key work "may":

"Although your committee sees no necessity in amending the rule itself, it anticipates that the use of the work 'may' with respect to the admissibility of evidence of crimes, wrongs, or acts is not intended to confer any arbitrary discretion on the trial judge [to exclude such evidence]. Rather, it is anticipated that with respect to permissible uses for such evidence, the trial judge may exclude it *only* on the basis of those considerations set forth in Rule 403, i.e. prejudice, confusion or waste of time." (Senate Judiciary Committee Report 93-1277, comment on Rule 404)

Rule 403, in turn, states that: "Although relevant, evidence may be excluded [only] if its probative value is *substantially* outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence" (emphasis supplied). As this Court has recently noted,* the key word in Rule

* *United States v. Gubelman*, — F.2d —, Dkt. No. 77-1279 (2d Cir., Feb. 24, 1978), slip op. at 1752.

403 is "substantially." It reflects a policy that runs throughout the new Rules that discretionary decisions should be weighted in favor of admissibility.* See also *United States v. Magnano*, 543 F.2d 431, 435 (2d Cir. 1976), *cert. denied*, 429 U.S. 1091 (1977) (prejudicial nature must "overwhelm" the probative value to warrant exclusion). Under this standard, it is patently absurd to suggest that Judge Pollack acted "arbitrarily" or "irrationally" in admitting the similar act evidence. As indicated, the probative value was emphasized by Mahler's continued insistence that knowledge and intent were key issues. Thus, the kind of proof presented in this case fell well within the "familiar molds" of similar act proof having a high probative value. *United States v. Papadakis*, 510 F.2d 287, 294 (2d Cir.), *cert. denied*, 421 U.S. 950 (1975). See *United States v. Deaton*, 381 F.2d 114 (2d Cir. 1967).**

* Prof. Rothstein of Georgetown Law School has said of the new rules, "Perhaps the dominant theme is a 'bias' in favor of admissibility." P.F. Rothstein, "Some Themes In The Proposed Federal Rules of Evidence," 33 Fed. B.J. 21 (1974).

** Mahler attempts to diminish the probative value by emphasizing the span of time between its commission and the trial (MBr. 33, n.50). But "prior crimes involving deliberate and carefully premeditated intent—such as fraud and forgery—are far more likely to have probative value with respect to later acts than prior crimes involving a quickly and spontaneously formed intent." *United States v. San Martin*, 505 F.2d 918, 923 (5th Cir. 1974). There is no logical reason to believe that, having once engineered a complicated stock fraud, Mahler would lose the capacity over any expanse of time to understand that highly similar acts in which he was later engaged were likewise fraudulent. There are no fixed standards for measuring the timeliness of other-crimes evidence introduced as similar act proof (by contrast with impeachment proof); where, as here, the similar act proof is admitted primarily on the issues of the knowledge and intent with which the defendant acted at the time of the events with which he is charged, the logical measure is the time between the commission of the similar act and the commission of the act charged in the indictment. Here, this would be eight years (not twelve years as Mahler's brief implies). This is shorter than other instances where similar act proof was properly

[Footnote continued on following page]

By contrast, the "unfair" prejudice to Mahler from the introduction of this proof was minimal. Unlike a narcotics conviction or an assault conviction, Mahler's prior convictions are suggestive of little more than the very things for which they were properly introduced, *i.e.*, that Mahler acted dishonestly and with fraudulent intent in a factual context similar to the one in question. The entire harm to Mahler from the admissibility of these convictions came precisely and directly from what gave them their relevance; since, conversely, there was nothing about them that was irrelevant, their introduction was not prejudicial at all and certainly did not constitute the "unfair" prejudice condemned by Rule 403.*

admitted: *Eg.*, *United States v. Magnano*, 543 F.2d 431, 435 (2d Cir. 1976), *cert. denied*, 429 U.S. 1091 (1977) (13-year gap, as appears more clearly from the briefs on appeal); *United States v. DeVincent*, 546 F.2d 452, 456-57 (1st Cir. 1976) (Coffin, J.), *cert. denied*, — U.S. — (1977) (twenty-year old armed robbery conviction and ten-year old murder conviction admitted on Government's direct case under Rule 404(b)); see also *United States v. Cohen*, 544 F.2d 781, 786 (5th Cir.), *cert. denied*, — U.S. — (1977) (five years); *United States v. Ziedman*, 540 F.2d 313 (7th Cir. 1976) (five years); *Miller v. United States*, 397 F.2d 272 (5th Cir. 1968) (Thornberry, J.) (five years); *United States v. Gordon*, 244 F.2d 541 (2d Cir. 1957) (*per curiam*) (six years); *United States v. Feldman*, 136 F.2d 394 (2d Cir. 1943) (12-year old prior crime, committed six to nine years prior to crimes charged).

* As Judge Weinstein has noted, "unfair prejudice," as used in Rule 403, means prejudice that "appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish, or triggers other mainsprings of human action . . .", 1 Weinstein, *Evidence* at 403-15-16 (1975)—in a word, inflammatory. As this Court has recently had occasion to note, "testimony concerning extremely similar acts is not inflammatory in the way that an unrelated violent crime might be", *United States v. Gubelman*, *supra*, slip op. at 1752, and, in the case of Mahler's prior convictions, the proof was not inflammatory at all. Far from being "the equivalent of a bloody shirt, . . . a dying accusation of poisoning, . . . or a claim of homosexuality," *United States v. Leonard*, *supra*, 524 F.2d at 1091-92, it related solely to Mahler's direction of a stock manipulation, hardly the kind of evidence calculated to enrage the jury or derail its deliberations.

B. Mahler's Prior Convictions Were Properly Introduced to Impeach His Credibility

Whatever objections Mahler had to the introduction of his prior convictions were waived once Mahler took the stand. At that point, the convictions were properly introduced as impeachment evidence and their prior admission as similar act evidence would be, at worst, harmless error.* Thus, Mahler must demonstrate that the District Court abused its discretion, not only when it admitted the prior convictions for similar act purposes, but also when it admitted them as impeachment evidence. This second claim is as ill-founded as the first: quite aside from their high probative value as similar act evidence, it is difficult to conceive of convictions more directly probative on the issue of credibility than Mahler's prior convictions for perjury and fraud.

Rule 609(a)(2) of the Federal Rules of Evidence provides that prior convictions involving "dishonesty or false statement" *must* be admitted for impeaching a defendant (or any other witness) once he takes the stand. As stated in the final Congressional commentary on the rule:

* Cf. *United States v. Vario*, 484 F.2d 1052, 1054-55 (2d Cir. 1973), *cert. denied*, 414 U.S. 1129 (1974). Mahler's Brief insinuates (MBr. 20) that he would not have testified at the retrial had his convictions not already been introduced on the Government's direct case. The record is barren of any support for this claim, since Mahler made no such claim before taking the stand nor in any other way attempted to preserve any appellate points that were waived by his taking the stand. While it is true that he did not testify at the first trial, the record is clear (see ITr. 43-44) that he originally intended to do so (as his Brief virtually concedes, MBr. 28, n. 39) and only changed his mind when, having fired his counsel mid-way through the first trial and undertaken to represent himself, he realized he could have the benefits of taking the stand, without assuming any of the burdens, by the simple device of giving a highly personalized pro se "summation".

"The admission of prior convictions involving dishonesty and false statement is *not* within the discretion of the Court. Such convictions are *peculiarly probative of credibility* and, under this rule, are *always* to be admitted." (Conference Committee Report 93-1597, comment on Rule 609; emphasis supplied).*

The only exception to the mandatory admission of such convictions is the provision in Rule 609(b) that, if such convictions are more than 10 years old, the matter is remitted to the trial judge's discretion for a determination as to whether the probative value of the conviction substantially outweighs its prejudicial effect. At the time of the first trial of this case (April-May, 1977), Mahler's convictions were slightly less than ten years old, and their admission was therefore mandatory.** Nonetheless, Mahler's counsel attempted to persuade Judge Frankel that the ten-year period should be deemed to have expired on the factually inaccurate theory that Mahler's original surrender to Danbury Prison was delayed many months

* As the commentary to the rule further makes clear:

"By the phrase 'dishonesty or false statement' the Conference means crimes, such as *perjury* or *subornation of perjury*, *false statement*, *criminal fraud*, *embezzlement*, or *false pretense*, or any other offense in the nature of *crimen falsi*, the commission of which involves some element of *deceit*, *untruthfulness*, or *falsification* bearing on the accused's propensity to testify truthfully." (*id*; emphasis supplied).

This describes Mahler's prior convictions to perfection.

** For the purposes of Rule 609(b), the age of the conviction is measured from the date the defendant was released from any confinement he was serving under that conviction. In Mahler's case, the date of measurement for both prior convictions was June 19, 1967, the date he was released from Danbury Prison after serving three-and-a-half months on the concurrent 18-month sentences (reduced from 2 years) that he received on his two prior convictions.

in order to enable him to testify as a Government witness against his co-defendants. After receiving written submissions and holding oral argument, Judge Frankel ruled as follows:

"First, insofar as there may be, and I am not sure that there is, any discretion with respect to calculating the 10 years, I resolve that against the defendant in the light of all the circumstances as they have been explained to me. I don't think, based on what I understand is both the language of the rule and its history, I don't think that I have discretion to decide that the prejudice from this particular conviction will outweigh its relevance so that it should be excluded. But [second], after thinking about it over and over, I think if there is any discretion, considering the nature of the case and what's been given to me about the character of the proposed proof concerning Mr. Mahler and his life in general, and his activities in particular, whether guilty or innocent, I think I would resolve that too against Mr. Mahler and let this impeaching evidence be used." (Tr. 43; emphasis supplied)*

Following the mistrial, the commencement of the retrial was postponed by a nearly three-month continuance that

* The record suggests that by "the nature of the case and what's been given to me about the character of the proposed proof", Judge Frankel was referring to the fact that the proof consisted of convictions going directly to credibility in a case in which there was very likely to be a central credibility contest between Mahler and the primary Government witnesses against him (most of whom were likewise open to impeachment by prior convictions). As then-Circuit Judge Burger wrote in upholding the introduction of the prior convictions of both a defendant and his chief accuser in *Gordon v. United States*, 383 F.2d 936, 941 (D.C. Cir., 1967), in such circumstances there are "greater, not less, compelling reasons for exploring all avenues which would shed light on which of the two witnesses was to be believed."

Mahler and his counsel requested (and received) from Judge Pollack "in the interests of justice." In the interim, the ten-year limit on the mandatory admission of the convictions expired.* Consequently, on July 29, 1977, the Government gave formal notice of its intention to introduce the convictions for impeachment purposes at the retrial under the discretionary standard of Rule 609(b), citing Judge Frankel's alternative holding. (G App. 29-31). Thereafter, both Mahler's counsel and Mahler personally submitted motions seeking an advance ruling precluding the Government from introducing this evidence; the Government submitted reply papers; and Judge Pollack, on two separate occasions prior to trial, denied Mahler's motions.

Technically, all Judge Pollack denied was Mahler's request for an advisory ruling.** But construing Judge Pollack's pre-trial rulings as a decision on the merits,

* Since this expiration was the result of Mahler's various requests for continuances, and since, moreover, the Government was willing, when a juror suffered a heart seizure at the first trial, to accept an 11-juror verdict as to all defendants, but Mahler and Ubben refused (thereby occasioning the re-trial), it may be that Mahler is equitably estopped from claiming that the 10-year limitation expired on his convictions, in which case they would have been still automatically admissible at the second trial. See *United States v. Little*, 567 F.2d 346, 350 n.4 (8th Cir. 1977), where the Government made this argument, claiming that the defendant ought not to be able to profit from his "dilatory tactics," but the Court found it unnecessary to reach the question. See also *United States v. Mullins*, 562 F.2d 999 (5th Cir. 1977), where the Court held that the period in which the defendant was a fugitive must be excluded in calculating the ten-year period of Rule 609(b).

** No affidavit was presented from Mahler indicating his intention to take the stand or what his testimony might be. Thus, there was "no meaningful invocation of judicial discretion." *United States v. Costa*, 425 F.2d 950, 954 (2d Cir. 1969), cert. denied, 398 U.S. 938 (1970).

this decision was an easy one for the District Court to reach, for a number of reasons. *First*, the convictions were just barely beyond the 10-year mandatory-admission period. By contrast, the admission of convictions much older than these, and sometimes far less directly probative on the issue of credibility, has been approved for impeachment purposes both before and after the promulgation of Rule 609.* *Second*, the convictions were, on their faces, the classic kind of convictions bearing on credibility. The high degree of probative value that led Congress to make their admission mandatory if they were less than 10-years old did not suddenly dissipate when they became, as measured by Rule 609(b), 10-years-and-

* *E.g.*: *United States v. Little*, 567 F.2d 346, 350 (8th Cir. 1977) (14-year-old fraud conviction admitted under 609(b)); *United States v. Cohen*, 544 F.2d 781, 784 (5th Cir.), *cert. denied*, — U.S. — (1977) (13-year-old fraud conviction admitted under 609(b)); *United States v. Kowalski*, 502 F.2d 203, 205 (7th Cir. 1974) (Justice Clark, sitting by designation), *cert. denied*, 420 U.S. 979 (1975) (defendant impeached with convictions of 42, 37, and 26 years of age); *United States v. DiLorenzo*, 429 F.2d 216, 220 (2d Cir. 1970), *cert. denied*, 402 U.S. 950 (1971) (defendant impeached with 19-year-old and 21-year-old convictions for forgery and larceny); *United States v. Zubkoff*, 416 F.2d 141, 143-44 (2d Cir. 1969), *cert. denied*, 396 U.S. 1038 (1970) (defendant impeached with 39-year-old conviction for unlawful entry and 28-year-old conviction for petit larceny); *United States v. Palumbo*, 401 F.2d 270 (2d Cir. 1968), *cert. denied*, 394 U.S. 947 (1969) (defendant impeached with 39-year-old conviction for armed robbery, 31-year-old conviction for breaking and entering, 23-year-old conviction receiving stolen property and 12-year-old conviction for armed robbery). *But cf.* *United States v. Shapiro*, 565 F.2d 479 (7th Cir. 1977) (38-and-24-year-old convictions should have been excluded; one judge dissenting); *United States v. Puco*, 453 F.2d 539 (2d Cir. 1971), *cert. denied*, 414 U.S. 844 (1972) (21-year-old narcotics conviction should have been excluded).

four-months old.* *Third*, the legislative history of Rule 609 is replete with evidence that it was precisely the desire to admit convictions like these that led Congress to provide for the admission of convictions on a discretionary basis even after the 10-year limit had expired.** *Finally*, Judge Pollack had before him the prior ruling, quoted above, of another experienced trial judge, who

* As this Court recently said in *United States v. Ortiz*, 553 F.2d 782, 784 (2d Cir. 1977) in regard to those portions of Rule 609 calling for discretion:

"This rule gives broad discretion to the trial judge and its exercise should not be disturbed absent a clear showing of abuse. In the exercise of this discretion, many factors are relevant. *Prime among them is whether the crime, by its nature, is probative of lack of veracity.*" (emphasis supplied).

In addition, as this Court said only last year, where the defendant "testified in his own defense at the trial that resulted in his prior conviction, . . . his conviction can be viewed as 'a *de facto* finding that the accused did not tell the truth when sworn to do so.'" *United States v. Hayes*, 553 F.2d 824, 828 (2d Cir. 1977), quoting *Gordon v. United States*, *supra*. In this case, Mahler, on cross-examination, admitted that he had perjured himself when he testified in his defense at the trial resulting in his first conviction. (Tr. 1422-23).

** One Court has summarized the legislative history as manifesting "Congress' belief that crimes involving dishonesty or false statements are *always* highly probative on the issue of a witness' credibility." *United States v. Dixon*, 547 F.2d 1079, 1083-84 (9th Cir. 1976). The legislative history reveals that the discretionary provision for convictions of greater than ten years of age was added because of the testimony of persons like Judge Friendly of this Court, who told the House Subcommittee that drafted the provision:

"I fully agree that it is wrong to rake up some 30-year-old, or even a 5-year-old conviction of a minor crime. But why ban an 11-year-old conviction of . . . perjury? It is much better to leave such matters to the good sense of judges . . ." (Testimony reprinted in 3 Weinstein, *Evidence*, at 609-34 (1975).)

Judge Friendly's example of an 11-year-old perjury conviction could hardly be more appropriate than to the facts of this case.

had not limited himself to admitting the convictions under the mandatory ten-year basis, but had declared that, even if the matters were discretionary (i.e., even if it fell under Rule 609(b)), he would admit Mahler's prior convictions.

Judge Pollack's decision was so obviously correct that, on this appeal, Mahler does not attack the *substance* of the ruling, let alone claim that it was an abuse of the broad discretion given to trial judges in this (as in the similar act) area,* but rather limits himself to an attack on the *form* of the ruling. Specifically, his claim is that the "trial court made none of the specific findings required by Rule 609(b)." (MBr. 38). The claim is frivolous. Rule 609(b) provides that, in order to admit convictions older than ten years for impeachment purposes, the District Court must "determine, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect." Though it might be the better practice for the District Court to specify on the record what the "specific facts and circumstances" were that led it to such a determination, the rule on its face does not so require.** Nor did Mahler or his counsel ever

* *United States v. Ortiz*, 553 F.2d 782, 784 (2d Cir. 1977); *United States v. Little*, 567 F.2d 346, 350 (8th Cir. 1977); *United States v. DiLorenzo*, *supra*, 429 F.2d at 220 (2d Cir. 1970); *United States v. Palumbo*, *supra*, 401 F.2d at 274 (2d Cir. 1968). See generally *United States v. Robinson*, 560 F.2d 507, 515-16 (2d Cir. 1977) (*en banc*).

** Mahler's Brief cites a sentence from the Senate Judiciary Committee Report on this provision suggesting that it was intended that the District Court would put such findings "on the record" (MBr. 38). Needless to say, neither Mahler nor his counsel ever brought this single sentence of legislative history to the District Court's attention. Following the issuance of that Senate report, the House and Senate Conference Committee on the Federal Rules of Evidence amended the provision still further

[Footnote continued on following page]

ask the District Court to make such specific findings. Indeed, it is hard to see how Mahler was prejudiced by the failure of Judge Pollack to make specific findings on the record in these pre-trial decisions, when all the factors that could possibly have entered into his decision were at that stage a matter of cold record, fully available for appellate review.

At any rate, present case law construing 609(b) holds that the failure to make such explicit findings on the record is at worst harmless error, even at the moment of admitting such evidence, let alone, as here, merely at the time of denying motions for an advance "advisory" ruling precluding their introduction. *United States v. Cohen*, *supra*, 544 F.2d at 785-86 (5th Cir. 1977). Similarly, this Court has recently found to be at worst harmless error the failure of the District Judge to articulate the grounds for his discretionary ruling under the closely related standard of Rule 609(a)(1). *United States v. Hawley*, 554 F.2d 50 (2d Cir. 1977); see also *United States v. Ortiz*, 553 F.2d 782 (2d Cir. 1977). The same result has been reached in other Circuits. *E.g.*, *United States v. Wiggins*, 566 F.2d 944, 946 (5th Cir. 1978) (*per curiam*); *United States v. Mahone*, 537 F.2d 922, 928-29 (7th Cir. 1976). By contrast, Mahler has not cited a single case holding that a District Court's failure to articulate on the record the factors underlying his deci-

to require advance written notice by a party proposing to introduce such a conviction, so as to provide an opportunity for more detailed statements from both sides on the reasons why such a conviction should be admitted or excluded (Conference Committee Report 93-1597, comment on Rule 609(b))—which is precisely what happened here. Congress undoubtedly contemplated that this advance written presentation by the respective parties would create a sufficient record of the "specific facts and circumstances" involved as to make any repetition of them by the District Court functionally unnecessary, since there would be a more than adequate record for appellate review.

sion to admit a prior conviction for impeachment purposes under Rule 609 (let alone a mere decision to deny a request for an advisory ruling) constitutes noticeable error, let alone reversible error.

In sum, Judge Pollack's ruling was eminently correct and procedurally proper. The impeachment value of the prior convictions was obvious and is not even contested by Mahler on appeal. Any possible detrimental impact on Mahler was lessened by the fact that the convictions were independently admissible as similar acts. Indeed, when on Mahler's cross-examination the convictions were actually introduced for impeachment purposes, Mahler made absolutely no objection under Rule 609. By that time he had already exploited them for his own purposes in his opening,* as he did throughout the trial.** Cf. *United States v. Mariani*, 539 F.2d 915, 920-21 (2d Cir. 1976). Mahler simply does not come close to demonstrating that Judge Pollack's broad discretion under Rule 609 was abused.

* In his opening statement—that is, before Judge Pollack had given a final ruling on the admissibility of the convictions either as impeachment or as similar act evidence—Mahler's counsel explicitly suggested that the fact of Mahler's prior convictions caused the Government to bring the prosecution:

"It's very easy to get the government to buy the fact that Mahler is the culprit. Twelve years ago Mahler was convicted in this courthouse and Mahler becomes the culprit."
(Tr. 40).

** For example, Mahler's first witness, Charles Hecht, testified on his direct testimony that Mahler had always been candid and open with him about his prior conviction (Tr. 1173) and that, indeed, as a result of his prior conviction, Mahler was, in Hecht's "opinion", "extremely careful" to abide by the securities laws. (Tr. 1182). When Mahler himself took the stand, he used the opportunity of his direct testimony not only to give his own (watered-down and inaccurate) version of his prior convictions (Tr. 1318-19) but also to claim that the reason he had used an alias throughout his dealings in Industries International was to avoid the "embarrassment" resulting from people's association of his real name with his prior convictions (Tr. 1330).

In conclusion, Mahler's first point on this appeal would be without merit even if his prior convictions had been introduced only as impeachment evidence or only as similar act evidence. But the fact that they were admitted for both purposes renders Mahler's claim frivolous; for in the posture in which this case went to the jury for its deliberation, the combined probative value of this proof as both "classic" similar act evidence and "peculiarly probative" impeachment evidence vastly outweighed any possible claim of prejudice.

POINT II

Judge Pollack's Conduct of the Trial Was Impartial and Entirely Fair to the Defendants.

For his remaining point on appeal, Mahler resorts to a wholly unworthy attack on the District Court, in which he combines mischaracterizations with misstatements in a vain attempt to construct out of perfectly fair rulings an accusation that the trial court purposely deprived him of a fair trial. The various specific rulings of which Mahler complains were, in fact, entirely correct. Doubtless they were rulings adverse to Mahler's position, even as numerous other rulings by Judge Pollack were excessively favorable to Mahler's position. But, as this Court pointed out in *United States v. Schwartz*, 535 F.2d 160, 165 (2d Cir. 1976), *cert. denied*, 430 U.S. 906 (1977), "Adverse rulings, standing alone, do not establish judicial bias or prejudice, *Berger v. United States*, 255 U.S. 22, 31, 42 (1921), nor create a reasonable question of judicial impartiality." Moreover, even assuming *arguendo* (and quite contrary to fact) that all the Court's rulings of which Mahler complains were erroneous, they would not warrant reversal of this conviction. By and large, they relate to miniscule matters that were not even the subject of specific objections and that could not be said to have affected Mahler's "substantial rights," a necessary condition for

reversal.* Recognizing this, Mahler has attempted to create from them an amorphous aura of "prejudice" by resort to nebulous but pejorative characterizations. Thus, he claims that "having lived through the trial," he "doubts . . . that the record can reveal just how coercive the atmosphere during trial was for the defendant and his counsel." (MBr. 66, n.90). We, too, lived through the trial and must simply state that these characterizations are untrue. The atmosphere at trial was one of fairness, decorum, and, as criminal trials go, comparative calm and quiet. Any claim to the contrary finds no support, in the record or otherwise.

(1) *The superseding indictment and proceedings before trial.* Mahler's first specific complaint is the failure of the District Court to grant his request for an additional, 30-day continuance following the return of the superseding indictment one week before trial. The truth is that Judge Pollack would have acted wholly irrationally if he had granted this motion.

The original indictment (MApp. 14-34) named 10 defendants in 20 counts, with some of the counts naming only particular defendants and others describing the roles of particular defendants in detail. Thus, as the cases against one after another of the defendants were terminated (three through acquittals and five through guilty pleas), the original indictment became ever more unwieldy and confusing.** Finally, on September 28, 1977, with the guilty plea by the third most important

* *Glasser v. United States*, 315 U.S. 60, 83 (1942); *United States v. Lamont*, 565 F.2d 212, 224 (2d Cir. 1977), cert. denied, — U.S. — (1978).

** For example, Count Eighteen, one of the longest counts in the original Indictment, was a perjury charge against defendant Michael Dutzar alone. When Dutzar pleaded guilty to this charge, the count became at best irrelevant, at worst a source of distraction, and very likely prejudicial to the remaining defendants.

defendant, Billy B. Lovejoy, very large sections of the indictment became irrelevant.* Accordingly, the Government immediately drafted a "streamlined" superseding indictment (MApp. 35-44) that removed all the extraneous charges and narrowed both the number and scope of the remaining charges against the two remaining co-defendants, Mahler and Ubben. On October 4, 1977—less than a week after Lovejoy's plea and a full week before the commencement of trial—the Grand Jury returned this superseding indictment. Mahler and Ubben were immediately notified and arraigned the next day.**

Of necessity, the superseding indictment did not track the precise language of the first indictment; it was designed to provide a circumscribed list of charges that focused on the roles of the remaining defendants, Mahler and Ubben. But to anyone even superficially familiar with the original indictment, let alone the original trial,*** it was clear that the superseding indictment added noth-

* For example, the very first "means" specified in the description of the fraud scheme (Counts One Through Ten of the original Indictment) was that defendant Billy Lovejoy fraudulently acquired the Dri-Flo pump in July, 1971 and thereafter altered its design beyond workability. Since the Government never claimed that Mahler or Ubben became involved in the scheme until the summer of 1972, this paragraph was no longer relevant once Lovejoy pleaded guilty.

** Mahler's Brief inaccurately claims that "The government offered no explanation regarding why it had belatedly sprung a superseding indictment on the defendants" (MBr. 43). On the contrary, by letter of October 8, 1977 (GApp. 42-44) (copies of which were served on both Mahler and his counsel), the Government informed the Court at length that the recent guilty pleas by the co-defendants had necessitated this superseding indictment, which was "sought solely to narrow and simplify the case for the jury."

*** Mahler's retained counsel at the retrial, Messrs. Sharp and Janis (who also represent Mahler on this appeal), had represented co-defendant Greenberg at the first trial of the case.

ing new. To Mahler, however, it provided an occasion for more of the dilatory tactics that had delayed the first trial before Judge Frankel for nearly five months (notwithstanding that Judge Frankel was part of the Southern District's "pilot program" designed to bring cases to trial within 60 days) and had delayed the retrial before Judge Pollack another four months (notwithstanding the statutory requirement that retrials take place within 60 days from the date of the mistrial, 18 U.S.C. 3161(e)).*

For example, in the period between October, 1976 and October, 1977, Mahler had changed attorneys (some appointed and some retained) approximately ten different times, almost every time using it as an excuse to seek a further delay or continuance. When, in late March, 1977, Judge Frankel had refused any further continuances or change of counsel, Mahler had responded by refusing to communicate with either of the two Court-paid attorneys that Judge Frankel had appointed to jointly represent him—finally driving Judge Frankel to order Mahler remanded until he agreed to cooperate with counsel. (March 23, 1977, Tr. 8). Notwithstanding this history of dilatory and contemptuous conduct before Judge Frankel, Judge Pollack, when the case was assigned to him for retrial, had agreed "in the interests of justice" to the request made to him by both Mahler and his then-latest counsel (as well as by Ubben's counsel) for still another major adjournment, until October, 1977 (July 11, 1977 Tr. 2-21). As the date of trial grew near, Mahler, *pro se*, began filing one new motion after another, seeking continuances or other delays on every conceivable ground: ineffective assistance of counsel, inability to communicate with counsel, desire to retain

* At no time during the pendency of either the first trial or the retrial did the Government ever seek any adjournment or continuance.

new counsel, severance, government oppression, government delay, collateral estoppel, failure to state a claim, etc. As Judge Pollack, who conscientiously held hearings on several of these motions despite their obvious want of merit, stated in ruling on the last of these motions made prior to the return of the superseding indictment:

"Stubborn persistence on grounds that lack factual basis and present no legal cause has marked the defendant Mahler's resistance to retrial of the grave charges against him. Every effort to delay and embarrass and embroil this litigation in side forays has been used by him in the vain expectancy that re-telling meritless positions will enhance their credibility and standing. Suffice to say this latest attempt to derail the trial and plunge it into delay and confusion on false bases is no better than its predecessors, which were rejected. Motion denied." (GApp. 36).

It was against this background that Mahler, following his arraignment on the superseding indictment, had his then-counsel orally move for no less than a 30-day continuance "in order to address motions to the new indictment and to prepare again and anew the defendant's opening." (Oct. 6, 1977 Tr. 9). Even if it had been a wholly new indictment, the Rules of this District would have provided only ten days for making motions; and, in fact, in the full week before trial, Mahler never did file any motions addressed to the new indictment. More fundamentally, as the District Court found:

"The superseding indictment is a streamlined version of the old indictment so as to make perfectly clear what was already clear but prolix in the old indictment. There is absolutely nothing new in the thing at all, and any application of this sort is of a dilatory character."

Just one day after Judge Pollack made this ruling, another motion (MApp. 51-53) seeking a continuance on account of the superseding indictment was filed, purportedly by Mahler *pro se*. This motion likewise claimed that a continuance was necessary so that Mahler could file motions of a wholly unspecified nature. In addition, the motion darkly hinted at some "improper," but likewise unspecified, use of the Grand Jury by the prosecutor.* Judge Pollack recognized that the motion added nothing to the one he had denied just the day previously. As he ruled:

"The defendant Mahler has set up a harassing stream—endless—of motions to obstruct the trial of the charges against him. He does this repetitively. The latest motion for a continuance is a repetition of one denied already. There is no merit to the present motion. Denied." (MApp. 56).

Finally, on the morning of trial, Mahler, "pro se," filed a petition with this Court seeking to mandamus Judge Pollack for failure to grant the continuance. The motion was denied by this Court less than one hour after it was filed, and the case proceeded to trial, with Mahler's new counsel now entering their appearance. Although in the mandamus papers filed with the Court of Appeals at 9:00 A.M. that morning, it was stated that Mahler was "totally unprepared to go to trial," at 9:45 a.m. his new, retained attorneys stated as follows:

"THE COURT: Are you fully ready to try this case?"

* What this motion failed to reveal was that it had been drafted, not by Mahler *pro se* as it purported, but by new counsel that Mahler, the "indigent", was planning to retain and bring into the case, as in fact he did a few days later. Had this fact been revealed, it would have been obvious to all concerned that the only real purpose of this motion was to try to get extra time for the new counsel.

MR. JANIS: Yes, your Honor, we are prepared to go ahead." (October 11, 1977 (pre-trial Tr. 2)).

As this Court has repeatedly emphasized, "[t]he disposition of a request for continuance rests in the discretion of the trial judge and the exercise of that discretion will not be disturbed unless a clear abuse is shown." *United States v. Bentvena*, 319 F.2d 916, 934-35 (2d Cir.), *cert. denied sub nom. Ormento v. United States*, 375 U.S. 940 (1963).^{*} Here, Mahler does not come close to showing an abuse of discretion in the District Court's obviously correct denial of Mahler's continuance motions. Since the superseding indictment merely reduced the charges and Mahler's trial counsel, having also participated in the first trial (as counsel for a co-defendant) were more than familiar with the case, there was simply no basis for granting a further continuance. Indeed, even on this appeal Mahler conspicuously fails to state how the two indictments substantively differed or how, specifically, he was prejudiced by the failure to grant him a continuance. As this Court said recently in *United States v. Rastelli*, *supra*, 551 F.2d 902, 906: "In the absence of any particularization of prejudice, this Court will not find that the denial of the continuance was an abuse of discretion." **

^{*} *Accord, e.g., Ungar v. Sarafite*, 376 U.S. 575, 589 (1964); *Avery v. Alabama*, 308 U.S. 444 (1940); *United States v. Rastelli*, 551 F.2d 902, 905 (2d Cir.), *cert. denied*, — U.S. — (1977); *United States v. Carroll*, 510 F.2d 507, 510 (2d Cir. 1975), *cert. denied*, 426 U.S. 923 (1976); *United States v. Hall*, 448 F.2d 114, 116 (2d Cir. 1971), *cert. denied*, 405 U.S. 935 (1972).

** Since Mahler cannot show such prejudice or reasonably contest on the merits Judge Pollack's denial of his continuance motions, his tactic on appeal is to claim that it was indicative of Judge Pollack's "bias" against him. This is sheer gamesmanship. A perfectly proper ruling simply cannot be evidence of bias. The truth is that Mahler's Brief simply assumes the bias and then claims that any discretionary ruling adverse to him was evidence of it.

The only other "evidence" of bias claimed by Mahler in this first subsection is Judge Pollack's ruling as to the form in which objections were to be made during trial—a ruling to which Mahler made no objection at the time but which he now claims "appeared to violate the spirit" (MBr. 46) of Rule 103(c), Federal Rules of Evidence. Specifically, Judge Pollack informed all counsel that, whenever they were before the jury:

"You may state the objection and the legal ground therefore, such as hearsay, relevancy, or materiality, and stop there. If there is any argument or explanation required, I will ask for it and you send up a memorandum which is marked as a Court exhibit. If I don't ask for it and you still feel you want to call to my attention something that should not be overlooked in connection with the objection, you send up a memo and we hold up the proceedings while I examine it, mark it as a Court exhibit, and give you an immediate ruling." (October 11, 1977 (pre-trial), Tr. 12).

This procedure, which guarantees that the jury will remain uncontaminated by attorneys' rhetoric and that the trial will proceed expeditiously, seems to us a most desirable procedure, deserving of commendation rather than criticism. But, whether a good or bad idea, it is surely a neutral one, affecting all parties equally. Indeed, as Ubben's counsel was already aware (Oct. 11, 1977 (pre-trial) Tr. 12), it had been Judge Pollack's procedure for years, in both criminal and civil cases. Thus, to assign it as evidence of Judge Pollack's "bias" against Mahler is incredible. Moreover, here as elsewhere, Mahler is unable to formulate a single specific example of how he was prejudiced by this procedure. He simply makes conclusory claims and then cites transcript references which,

if this Court cares to look at them, will be seen on their face to refute his claim.*

2. *Conduct during the Government's case.* Under this subheading, Mahler's Brief claims that Judge Pollack "intervened on behalf of the prosecution during presentation of the government's case" (MBr. 47). Mahler can

* Not content with charging bias on the part of the Court and impropriety on the part of the prosecutor, Mahler, in this subsection on pre-trial proceedings, goes the inevitable next step and accuses his immediately previous counsel (Robert Leighton, Esq.) of incompetency. Specifically, he claims (MBr. 44, n. 65) that Mr. Leighton acted "incredibly" in permitting the Government to submit certain materials to the Court *ex parte*. The facts are that, prior to the first trial, the Government submitted to all counsel (including Mahler's present counsel) a detailed "Trial Memorandum" outlining its case. (R. Doc. 52). One result was that the various defendants immediately tailored their alibis to the Government's proof; indeed, on at least two different occasions, Judge Frankel expressly held that the defendants were perjuring themselves on the stand. (ITr. 3849-50, 5576). Prior to the retrial, the Government prepared an expanded version of the Trial Memorandum, that included reference to some further facts that it hoped to present at the retrial that would undercut the perjured testimony given by the defendants at the first trial. The Government then sent a letter to all defense counsel (G App. 32-35) stating its intention to submit this Memorandum to Judge Pollack *ex parte* so that the defendants would not be able to prepare new perjurious alibis in advance, and inquiring whether counsel objected. The Government suggested that, rather than objecting, they might prefer to submit to the Court their own *ex parte* statements of what their own defenses would be. Apparently all three defense counsel then involved in the case preferred this alternative because none of them objected to the *ex parte* submission. Thereafter, the client of one of them, Lovejoy, pled guilty, the client of a second, Ubben, was engaged in considering whether or not to plead guilty, and the client of a third, Mahler, changed counsel, so that in the end none of them made their own *ex parte* submissions to the Court. How any of this is evidence of Judge Pollack's "bias," we are at a loss to comprehend.

not pretend that intervention *per se* is improper; this Court has long ruled that district courts "should take an active part when necessary to clarify testimony and assist the jury in understanding the evidence." *United States v. Tyminski*, 418 F.2d 1060, 1062 (2d Cir. 1969), *cert. denied*, 397 U.S. 1075 (1970). Rather, Mahler interjects the claim that Judge Pollack's intervention was "on behalf of the prosecution," and then asks this Court to view excerpts that on their face show no hint of bias through the distorting prism of that incorrect premise.

Taken on its face, the record fully refutes Mahler's claim. In the first place, Judge Pollack barely "intervened" at all, for any purpose. As he himself stated in response to one of the very few objections taken by Mahler's counsel to questions put by the Court:

"My own recollection of the somnolent attitude I have adopted in the past six days toward this case belies the suggestion that I have even taken notice, leave alone participated in much of what has been going on. You may be assured, however, that nothing has escaped me." (Tr. 1238)

The record, bearing out Judge Pollack's recollection, reveals that the number of questions asked of any and all witnesses by the Court is a very minute fraction of the number asked by counsel for either the Government or the defense.*

* This is one of the numerous distinguishing features between this case and the cases relied on by Mahler, such as *United States v. DeSisto*, 289 F.2d 833, 834 (2d Cir. 1961), where the Court asked 3115 questions of all witnesses, compared with just 1381 by the prosecutor and 3330 by all three defense counsel. By contrast, while we have not computed any precise figures in this case, a quick sampling suggests that Judge Pollack asked less than one or two percent of all the questions put to witnesses in this case.

In the second place, the very failure of Mahler's counsel to raise objection to all but a very few of the Court's questions belies any claim either that the questions were unfair or that they prejudiced Mahler. Indeed, Mahler's Brief does not cite a single instance where he objected to a question put by the District Judge during the Government's direct case (the subject of this subsection), and there appear to have been only two such objections during the defense case.

Finally, and most importantly, while under the law Judge Pollack would have been fully within his rights if he had asked questions to ferret out new facts, explore appropriate leads, examine credibility, or in a wide variety of other ways pursue the truth,* the fact is that what little intervention there was from Judge Pollack was directed mostly toward clarification of what had already been said—surely one of the most “neutral”, as well as most necessary, of a judge's prerogatives in assisting the jury in their fact-finding function. In the words of this Court: “A federal district judge has, as we have repeatedly said, a duty to attempt to clarify the witness' testimony and to get the jury to understand the evidence.” *United States v. Bernstein*, 533 F.2d 775, 796 (2d Cir.), cert. denied, 429 U.S. 998 (1976). That clarification was the purpose behind the great majority of Judge Pollack's questions is evident from a reading even of the examples of “intervention” selectively chosen and quoted in Mahler's brief. He can make it appear something else only,

* See generally *Glasser v. United States*, 315 U.S. 60, 82-83 (1941); *United States v. Lamont*, 565 F.2d 212, 220ff (2d Cir. 1977), cert. denied, — U.S. — (1978); *United States v. DeFillo*, 257 F.2d 835, 839-840 (2d Cir. 1958), cert. denied, 359 U.S. 915 (1959). In Justice Frankfurter's formulation in his concurring and dissenting opinion in *Johnson v. United States*, 333 U.S. 46, 54 (1948): “Federal judges are not referees at prize-fights but functionaries of justice. As such they have a duty of initiative...”

as noted, by prefacing such examples with conclusory characterizations, such as "The impatience and annoyance of the trial judge in interrupting or ridiculing defense counsel was apparent." (MBr. 53). In all the lengthy quotations in Mahler's Brief, there is not one word that even remotely justifies such ascriptions or any of the other, similarly pejorative labels with which Mahler's brief is peppered.*

Consider, for example, the following question put by the Court to a secondary Government witness (Tiemers, the transfer agent) and quoted in this section of Mahler's brief: *

"The Court: You have been asked questions by Mr. Rakoff to which you responded with the name Nelson. He asked you some questions with the name Mahler. Are they different people or the same person in what you have been testifying to?" (Tr. 591).

Of this perfectly proper, clarifying question, Mahler's Brief attempts to make the following argument: "the court took it upon itself to emphasize for the jury the undisputed fact that Arnold Nelson Mahler also used the name Arnold Nelson." (MBr. 48). Actually, at the stage when this question was asked (early in the trial and following a five day recess) there was no reason to assume that the jury fully realized that when a witness talked of "Nelson" he meant the defendant Mahler. Moreover, it had not been stipulated that Mahler was Nelson and this was, therefore, a disputed fact that remained to be established to the jury's satisfaction.**

* If anyone felt the lash, it was the Government, particularly when it tried to get advance rulings precluding defense counsel from improper questions or arguments (*e.g.*, Tr. 87, 336). See also p. 60, fn.**, *infra*.

** Take another typical example quoted in Mahler's Brief:

"Q. [Mr. Janis]: Mr. Steinert, you have been called as a summary witness, is that correct?

[Footnote continued on following page]

Without unnecessarily multiplying examples, the point is that the "interventions" by Judge Pollack of which Mahler's Brief complains will, upon inspection (and, especially, when read in context, rather than as Mahler's Brief quotes them), be seen to be perfectly proper interruptions, most frequently clarifications, involving mostly innocuous and usually trivial points.* As the Supreme Court said in *Glasser v. United States*, 315 U.S. 60, 83 (1942): "We must guard against the magnification on appeal of instances which were of little importance in their setting."

3. *Conduct during the defendants' case.* Allmost all of the portion of Mahler's Brief under this subheading is devoted to Judge Pollack's intercessions in the testimony of Mahler's first witness, Charles Hecht. Because Mahler recognizes that he must demonstrate not only that the Court was biased but also that the bias materially prejudiced him, he begins by labelling Hecht as his "probably most important" witness. (MBr. 54). But by any rational standard, Mahler's most important witness was Mahler himself. Clearly if the jury had credited Mahler, he would have been acquitted; conversely, the jury could have credited every single word Hecht said and still have

A. Yes, sir.

Q. And that was the purpose of your testimony, to summarize the evidence to the ladies and gentlemen of the jury?

The Court: The purpose of the testimony is what appears to be the purpose from the evidence given and the Court permitted his testimony to be given. Go from that." (Tr. 1091-92)."

Of this Mahler's Brief says: "The court abruptly cut off defense counsel from his legitimate line of inquiry." (MBr. 53). On the contrary, it was wholly illegitimate. The purpose to which the jury can put summary testimony is strictly a matter of law and for the judge; consequently, it was improper for defense counsel to try to invade the Court's prerogative in this fashion.

* It should also be noted that many instances of what appear, on the cold record, to be *sua sponte* interventions, were in fact responses to Government Counsel's rising to make an objection.

convicted Mahler.* Moreover, once Mahler, by his own testimony, revealed himself to be a rather flagrant perjurer (see Statement of Facts, *supra*), no witness in the world could have saved him from conviction in a case where the charge was, in essence, lying to the public.

In truth, Hecht, whose entire testimony (including cross) consumed no more than two hours, was a decidedly minor witness. Hecht was an attorney who had briefly represented Mahler in several shell reorganizations prior to Industries International but had then terminated their relationship until shortly before Mahler's indictment, when he undertook to represent Mahler in a contingent-fee lawsuit (which Mahler lost) against Mahler's erstwhile partner Zucker. By his own admission, Hecht had no knowledge whatever of any of the events involving Industries International. Indeed, he had no contact with Mahler at all during the entire period of the Industries International fraud, as well as interims of time both before and after it. Most of his testimony was admitted (over Government objection) under such rubrics as "background." (e.g. Tr. 1177). To pretend that it was of any material consequence to the case is to grasp at straws.

Moreover, Mahler neglects to inform this Court that his opportunity to adduce Hecht's testimony at all was a benefice extended to him by Judge Pollack to which he was clearly not entitled. At the first trial in the matter, Judge Frankel repeatedly ruled that, with one very short exception, Hecht's testimony was totally inadmissible (ITr. 3532-40). As a result, Hecht's testimony at that trial (including cross) was limited to nine pages, and consisted entirely of his background and a statement that he had overheard Zucker stating that he would "bury" Mahler in the Industries International matter. In the present trial, by contrast, his testimony went on for 65 pages (Tr. 1169-1234), and virtually all of the

* Indeed, Hecht's testimony was more often supportive of the Government's position than of Mahler's. See pp. 23-24, *supra*.

evidence specifically excluded by Judge Frankel was admitted.* Only after it was completed did Judge Pollack fully recognize that there had been no proper basis for its admission.**

* Hecht's direct testimony (Tr. 1169-97) consisted of his qualifications as a securities law "expert", his opinion as to the advantages and disadvantages of using a Rule 133 exemption, his meeting Mahler in early 1972 and representing him in connection with a few shell reorganizations (none of which were the subject of this case), his good impression of Mahler's candor and his opinion that Mahler was very careful to comply with all the securities laws whereas Zucker was not, his own opinion of what the securities laws required in such reorganizations, his belief that Zucker was untrustworthy, and his further belief that Mahler foolishly trusted Zucker, his separation from doing any further work for Mahler until 1975, his then representing Mahler in Mahler's lawsuit against Zucker regarding a company called Nationwide, and, in connection with that lawsuit, his overhearing Zucker tell Mahler that he was going to "bury" Mahler in Industries International. With the exception of this last item, which was relevant to Mahler's claim that Zucker was biased against him, this entire testimony was totally inadmissible. Hecht's opinions and beliefs about Mahler's and Zucker's respective carefulness, compliance with securities laws, etc., would not have been admissible even if they had come from a character witness and even if they had related to Industries International; but coming from someone who was expressly not offered as a character witness (Tr. 1243) and who was deriving them from other transactions, they were utterly beyond the pale. As for Hecht's legal opinions, the law of this Circuit (as the Government pointed out as early as the first trial) is firmly settled that the only permissible "legal expert" is the judge and that it is error to permit a party to call a "securities law expert" or anyone else to testify to any aspect of what the law is or requires, let alone whether any particular conduct conforms to it. *Marx & Co. v. Diners' Club, Inc.*, 550 F.2d 505, 509-512 (2d Cir. 1977), cert. denied, — U.S. — (1978).

** Indeed, Mahler quite clearly was the beneficiary of Judge Pollack's rule barring speaking objections by either party—which, ironically, he now claims shows Judge Pollack's "bias" against him (see p. 53 *supra*). As Judge Pollack noted the day after Hecht finished, "The thing I should not have done in

[Footnote continued on following page]

Having admitted this dubious testimony and permitted Mahler's counsel broad latitude in questioning Hecht, Judge Pollack was surely not required to turn over the Courtroom to Hecht or permit Hecht to usurp the Court's function by giving erroneous legal opinions or, as Hecht was particularly wont to do, use the Courtroom as a forum for discoursing on any subject under the sun. While Judge Pollack had to interrupt Hecht more than he did most other witnesses (including all the other defense witnesses such as Mahler himself), virtually every interruption was prompted by egregious failings on Hecht's part that included a refusal, bordering on contempt, to answer the questions put to him and a tendency to expound confusing, misleading, and sometimes plainly erroneous views of the law.*

the first place was to allow him to testify on the law. What he had to say was something for the judge to deal with, and instead of that I found myself swept along with his expressions of opinion in connection with securities law that left something to be desired." (Tr. 1242-43).

* Of the five excerpts quoted in Mahler's Brief (MBr. 54-59) as examples of Judge Pollack's "unfairly" interrupting Hecht, all but the last begin with the Court simply admonishing Hecht to "just answer the question," something Hecht, though an experienced lawyer, seemed determined not to do. And three of the five excerpts, said by Mahler's Brief to be examples of Judge Pollack's "hostility" toward Hecht (MBr. 56, 57), involved the Court's having to extract from Hecht a correct statement of pure questions of law after Hecht had given misleading or erroneous statements. As Judge Pollack so truly stated when, at the end of Hecht's testimony, Mahler's attorney (having raised no objection at the time of the questioning) belatedly complained of the Court's questions:

"Now I want to say to you, Mr. Sharp, that your client has had extraordinary latitude in the presentation of a witness to expound the law, which is not the function of an expert at all. And it was only to contain what might seem to be an excess of expression [in original: 'suppression'] with respect to Rule 133 that questions were asked by the Court so far as that witness was concerned." (Tr. 1238).

Finally, even apart from this factual context, the questioning of Hecht by Judge Pollack was perfectly proper and well within the boundaries set by this Court. For example, in *United States v. Natale*, 526 F.2d 1160 (2d Cir. 1975) *cert. denied*, 425 U.S. 950 (1976), the defendants complained of "excessive intervention" on the part of the trial judge, particularly in the questions he put to the chief defense witness (who was an attorney) such as whether he knew that the terms of a loan he was helping to arrange were "usurious." In words fully applicable here, this Court stated:

"The appellants contend that this 'hostile' line of questioning was intended to ridicule their witness and to discredit their defense that their relations . . . were conducted as normal business transactions. It is obvious from the record, however, that the court's questions were intended to assist the jury in its evaluation of the nature of the transactions in this case. This limited interjection by the trial judge was well within his active responsibility to assure that the issues were clearly presented to the jury." (526 F.2d at 1170).*

By contrast, this case bears no relation whatever to the case on which Mahler chiefly relies and cites and quotes repeatedly throughout this point of his brief, *United States v. Nazarro*, 472 F.2d 302 (2d Cir. 1973). There, for example, the District Court, in what was a close case, virtually took over the cross-examination of the defendants themselves, engaged in acrimonious battles with defense counsel in the presence of the jury, and even put his personal credibility on the line (e.g., "The Jury knows I'm not inventing this," 472 F.2d at 308). Nothing remotely approaching this is quoted in

* *Accord*, *United States v. Williams*, — F.2d —, Dkt. No. 77-1454 (2d Cir., April 6, 1978), slip op. at 2304; *United States v. DeFillo*, *supra*, 257 F.2d at 838-39 (2d Cir. 1958).

Mahler's Brief, nor is such to be found in the record. Rather here, as in *United States v. Newman*, 481 F.2d 222, 223 (2d Cir. 1973) (*per curiam*), this Court can rightly say:

"Nazzaro and this case are two different kettles of fish."

4. *Jury instructions.* The charge given to the jury by Judge Pollack was proper in all respects. Mahler's Brief, in highly conclusory fashion, claims the charge was "grossly one-sided" (MBr. 64) and characteristically attributes this to the Court's bias generally (MBr. 62) and more specifically to the fact that "the trial court did not even consider the requests made by Mr. Mahler's counsel" (MBr. 64). As to the claim of one-sidedness, since Mahler's Brief quotes no examples but simply refers this Court to the record, we can only do the same and note our own conclusion that the charge was perfectly fair to all concerned. As to the claim that Judge Pollack did not consider Mahler's requests to charge, the fact is that, despite repeated invitations from the Court, Mahler's counsel refused to submit requests to charge in any standard, recognizable, or usable fashion. Judge Pollack could not very well consider Mahler's "requests to charge" when Mahler never properly submitted any.

On the first day of trial, the Court directed that the Government furnish its requests to charge the following Monday and that the defendants file their requests prior to or at the close of the Government's case. (October 11, 1977 (pre-trial) Tr. 12). Both the Government and co-defendant Ubben complied, timely filing requests in the usual form. The Court then reminded Mahler's counsel to file their requests and urged them to include any specific objections they had to the Government's requests (Tr. 1236). Just two days before the case went to the jury, Mahler's counsel handed up what they claimed was a request to charge. Actually, it was an annotated tran-

script of the 117-page charge delivered by Judge Frankel at the first trial of this case (ITr. 6467-6584) (which Judge Pollack already had), with handwritten notes, deletions, arrows, interlineations, and cross-references, all put together in a single omnibus packet. This mass was at places so unwieldy * and so incomprehensible ** as to be largely useless to any Court that was not prepared to spend a great deal of time decoding it and putting it into a form approximating normal requests to charge. Accordingly, Judge Pollack, after inspecting the packet of pages handed up by Mahler's counsel, ruled that it was not what he considered a request to charge, stating:

"In the request to charge, you have given me another charge which you have annotated and I have my own notations of the charge, and I would like to have you point out to me what it is particularly that you are requesting. The rule is that if there is any part of your request that I don't agree with, I don't have to edit it. I don't want to get into that posture and say that what you have handed up to me contains matter that is not acceptable and therefore I reject it all. I don't like to operate that way. I would like to get your help, that is, to anything that you think should be charged that is not contained in the charge that I might give . . . If that gives you any help towards telling me what it is in particular you want, I will be guided by it. Other than that, I will have difficulty in determining what it is that you are

* For example, at page 6471 of Mahler's "charge," the Court was instructed to "Insert instructions given at pages 6582-6583," to which it then had to turn.

** For example, at page 6540 of Mahler's "charge," a paragraph was crossed-out, but then there was written beside it: "[ok]" with an arrow pointing to the paragraph. Did this mean that the Court was being requested to charge this paragraph after all, or not?

presenting that is new or different or which should be given." (Tr. 1246-47).*

Despite this clear request from the Court for something particularized or addressed to specific elements of the charge, Mahler's counsel chose not to respond, neither modifying, clarifying, or supplementing in any way whatever the disjointed "Request to Charge" they had belatedly presented to the Court. In the securities fraud case of *United States v. Kelly*, 349 F.2d 720, 759 (2d Cir. 1965) (Medina, J.), *cert. denied*, 384 U.S. 947 (1966), this Court stated:

"With respect to the instructions and requests as a whole, it may be well to repeat one or two generally accepted federal rulings that counsel frequently seem to have forgotten or to have overlooked. The first is that it is not the function of the trial judge to put lengthy, confusing or inaccurate requests for instructions through a winnowing or sifting process in an endeavor to select what is good and reject what is bad." (349 F.2d at 759, citing numerous cases).

Accord, e.g., United States v. Corallo, 413 F.2d 1306, 1324 (2d Cir.), *cert. denied*, 396 U.S. 958 (1969). Under

* As the first sentence of the above-quoted passage indicates, Judge Pollack had already read Judge Frankel's charge and made notations regarding it. Indeed, at the end of the first trial, Judge Frankel had specifically noted that he would forward his charge to the judge to whom the case was reassigned; and any close comparison between Judge Frankel's charge and Judge Pollack's charge shows that the two are substantively very similar, although each is expressed in the style personal to the respective judge. Consequently, Judge Pollack got no benefit from Mahler's re-submission of Judge Frankel's charge except to the extent that Mahler had made material changes in Judge Frankel's charge, which is precisely what Judge Pollack, as above-quoted, asked him to specify. This Mahler declined to do, and, indeed, in his present Brief, he even denies his alterations were substantial in any respect. (MBr. 63, n. 83).

the circumstances, Judge Pollack was more than justified in rejecting Mahler's disjointed, belated, and very lengthy submissions and asking him to select and pinpoint the particular matters of importance. See also *United States v. Tourine*, 428 F.2d 865, 869 (2d Cir. 1970), *cert. denied sub nom. Burtman v. United States*, 400 U.S. 1020 (1971). Moreover, Mahler totally ignored Judge Pollack's request that he specify what he disapproved of in the Government's requests to charge. Instead, Mahler limited himself to objecting, on the evening prior to the Court's instructing the jury, to certain of the Government's "Statement of Contentions"; and Judge Pollack acceded to most of his objections. (Tr. 1708).^{*} Clearly, if Mahler had had any objections to the Government's requests to charge, or if he wanted further argument or guidance concerning his own purported "request to charge," he would have raised it at this same time. Instead, he was silent.^{**}

^{*} Judge Pollack did not marshal the evidence. Rather, he had each party submit "contentions" and then read them to the jury. Mahler's and Ubben's were read almost precisely as submitted. It is hard to see how Mahler can seriously contend that the Court's charge over-emphasized the government's theory (MBr. 63), when the Judge's combined statement of the defense contentions was twice as long as his statement of the Government's contentions, even though the Government's case at trial had been several times longer than the defense case. See *United States v. Tourine*, *supra*, 428 F.2d at 869-70.

^{**} Mahler's Brief states that "On the morning on which the jury was instructed, the trial court, in violation of Rule 30 of the Federal Rules of Criminal Procedure, requested no argument concerning jury instructions, nor did it inform defense counsel that their Requests for Charge had been denied." (MBr. 63). As this Court said of an analogous claim in *United States v. Lamont*, 565 F.2d 212, 226 (2d Cir. 1977), *cert. denied*, — U.S. — (1978), this is "[p]erhaps the strangest cavil submitted to us" in defendant's brief. As indicated above, Judge Pollack effectively warned Mahler's counsel two days earlier that their so-called "request to charge," if it could be considered one at all, would be denied *in toto* if they did not undertake to make it useful to

[Footnote continued on following page]

Following his charge, Judge Pollack, in the usual manner, held the jury while he called the lawyers into the robing room and asked if they had any exceptions. Mahler's counsel began with a general exception to the charge "to the extent that the instructions departed from or omitted the requests we made" (Tr. 1790)—an objection calculated to be of no benefit to anyone but to simply create a talking-point for appeal. In response, Judge Pollack correctly pointed out that "I have had no request from the defendant Mahler at any time" (Tr. 1790)—an allusion, as everyone present understood, to the fact that he had rejected the packet submitted by Mahler as not being a proper request to charge.

Mahler's counsel then turned to other generalized objections, of the following kind: "we believe the instructions were somewhat one-sided in that they seemed to de-emphasize the protections afforded the defendants . . ." (Tr. 1791). What Judge Pollack or any other court was supposed to do in response to an objection of that kind, one cannot imagine. It certainly did not comply with the requirement of Rule 30 that a party excepting to a charge state "distinctly the matter to which he objects and the grounds of his objection."

Defense counsel then turned to what he claimed were "specifics," of which the first was that "it was not emphasized to the jury in strong enough terms that the

the Court by particularizing what they wanted him to charge. As also indicated above, an opportunity for argument was effectively given to Mahler's counsel the afternoon prior to the charge (when nothing remained but to charge the jury), but Mahler's counsel failed to avail himself of it. Cf. *United States v. Famulari*, 447 F.2d 1377, 1382 (2d Cir. 1971); *United States v. Barash*, 412 F.2d 26, 33 (2d Cir.), cert. denied, 396 U.S. 832 (1969). Additionally, Rule 30 does not, in fact, require such argument before the judge charges the jury but only before the jury starts deliberating.

indictment which the Court read to them at great length is of no evidentiary significance at all." (Tr. 1791-92). Since, in fact, Judge Pollack's charge on this point was closely modeled on what Judge Frankel had said on this subject (as included in Mahler's omnibus 'Request'), the point is frivolous.*

— Next, Mahler's counsel began objecting, by number, to certain of the Government's requests to charge. In response, Judge Pollack noted that he had departed considerably from the Government's requests,** and that it was therefore pointless at this stage for Mahler to say what he objected to in the Government's requests—which, Judge Pollack noted, Mahler had failed to do throughout the previous two weeks when the defense had had the Government's requests and when it might have done the Court some service. (Tr. 1791-94). Nonetheless, Mahler's counsel persisted in continuing through the Government's requests to charge (regardless of whether they conformed to the Court's charge), objecting to them by number, and

* Judge Pollack charged (Tr. 1714) as follows:

"The indictment, as I have told you, is a statement of accusations. It is not proof of anything that is said and nothing in it has evidentiary significance. You are told by the indictment what the issues are that you are going to be asked to decide."

This was taken, almost verbatim, from Judge Frankel's charge at the first trial (ITr. 6471) (where, in addition, Judge Frankel handed out copies of the indictment to each juror prior to delivering his charge).

** Mahler's complaint that the Court's charge "embraced virtually the entire government charge" (MBr. 63) is not only inaccurate but likewise irrelevant, for even if it were true, this Court "cannot be expected to reverse because the prosecutor formulated numerous requests for instructions with such skill and with such regard for the law as laid down in prior cases that these accurate and proper statements were adapted by the trial judge." *United States v. Kelly*, *supra*, 349 F.2d at 761-62.

failing to say what instruction should be given in their place or to correct them.*

As experienced trial counsel, Mahler's attorneys were well aware of how to properly state objections to a Court's charge—not by reference to some number in the request of another party, but by specific reference to the words or substance of the Court's own charge, and with particular suggestions as to how it should be corrected. Mahler's intention, it seems fair to infer, was not to aid the Court in correcting error (if any) but to try to make a record of Court "partiality" for appeal.** But, without belaboring the point further, it is obvious that Mahler, in fact, failed to preserve for appeal, in any but the most contrived sense, any objection to the charge.

Even now, Mahler largely fails to particularize what he claims was erroneous in Judge Pollack's charge. Rather, he tries to place on this Court the same burden he placed on Judge Pollack, as follows:

* After this had continued for a few more pages, the Court interrupted again, noting that "You are not quoting my charge at all. You are quoting the requests" (Tr. 1797), and again asking Mahler's counsel to direct his comments to the Court's own charge. But Mahler's counsel was not to be dissuaded from continuing this charade. After a few more minutes of his stating things like "On government number fifteen, the last sentence . . ." (Tr. 1799), the Court corrected him still a third time:

"THE COURT: Nobody is ever going to be able to find what you are talking about because there is no such thing as number fifteen as given to the jury." (Tr. 1799).

But Mahler's counsel simply continued, as before, objecting to the Government's requests, by number, quoting those requests, and failing to offer alternative language, let alone something addressed directly to the Court's own charge.

** Cf. *United States v. Lamont*, *supra*, 565 F.2d at 222, quoting *United States v. Reed*, 526 F.2d 740, 742 (2d Cir. 1975), *cert. denied*, 424 U.S. 956 (1976):

"A trial should not be a contest of wits between the court and defense counsel searching for reversible error."

"We invite the Court's attention to the specific and detailed exceptions noted at that time . . . Objections were made by reference to the instructions enumerated in the government's Request to Charge." (MBr. 64, n. 85).

This no more serves to preserve these points on appeal than it did at trial. If Judge Pollack's charge had misstated the law, Mahler's Brief should have specifically stated where and how, so that the Government could have responded and so that this Court could then assess whether or not the point was error, error that had been waived, plain error, or whatever.*

As this Court said recently in *United States v. Corey* 566 F.2d 429, 433 (2d Cir. 1977), "the perfect trial from the prosecution or the defense standpoint, is as rare as the perfect crime." Doubtless in this hard-fought securities case (the culmination of four years' investigation, nearly a year of court proceedings and two trials), some small errors may have been committed either to the detriment or (as in the case of the admission of Hecht's testimony) to the favor of the defendants. But on any fair

*The sole substantive error in Judge Pollack's charge that is alleged with anything remotely approaching specificity anywhere in Mahler's brief is the claim, made in a footnote, that "the court advised the jury that if the defendant was an aider and abetter, the jury 'must' find the defendant guilty" (MBr. 63, n. 84). Taken in context, it is clear that the Court's actual remark (Tr. 1728) was simply a statement that, if they found either defendant to be an aider and abetter (as previously defined), the jury "must" consider him the same as a principal—an accurate paraphrase of 18 U.S.C. § 2 and hardly exceptional. Cf. the charge recently quoted with approval by this Court in *United States v. FMC Corporation*, — F.2d —, Dkt. No. 77-1372 (2d Cir., February 23, 1978), slip op. at 1698 ("Therefore, if you find that the birds were killed by the products emitted from the FMC plant, then you *must* return a verdict of guilty . . ."). See also *United States v. Aloï*, 511 F.2d 585, 595 (2d Cir.), cert. denied, 423 U.S. 1015 (1975).

reading of the record, Mahler "was given a fair, impartial trial." (*Id.*). His attack in this Court on the fairness and impartiality of the trial judge is actually a commentary on the poverty of his position: having no more substantial claim, he is reduced to an essentially *ad hominem* attack. As to this, no one can improve on Judge Medina's statement in another such securities case, *United States v. Kelly*, *supra*, 349 F.2d 720 at 761, in words wholly applicable here:

"[A]ttacks upon the fairness and impartiality of the trial judge seem to have become commonplace in these criminal conspiracy cases. [Citations omitted] Perhaps counsel who do not practice in the Second Circuit yield to the temptation to indulge in this sort of thing more often than others. In this case not a single one of the claims of misconduct by the trial judge finds a shred of justification in the record. . . . It is bad enough when counsel for a defendant with a weak case turns his guns on the prosecutor; similar unfounded action against the judge presiding over the trial is not to be tolerated."

POINT III

Ubben's Claims Are Without Merit.

Ubben raises three points on this appeal. His first point (UBr. 17-19) takes issue with Judge Pollack's decision not to discharge the four alternate jurors at the conclusion of his charge but rather to keep them in reserve, separated from the deliberating members of the jury, until a verdict was reached. Ubben claims this decision did not comply with Rule 24(c) of the Federal Rules of Criminal Procedure. Since no objection to keeping the alternate jurors in reserve was made at trial and no prejudice resulted from their being held in reserve, Ubben's claim is without merit. *United States v. Nash*,

414 F.2d 234 (2d Cir.), *cert. denied*, 396 U.S. 940 (1969); *United States v. Hayutin*, 398 F.2d 944 (2d Cir.), *cert. denied*, 393 U.S. 961 (1968).

Immediately after delivering his charge Judge Pollack turned to the four alternate jurors and informed them—without any objections from counsel—that they were being kept “in reserve.” * He instructed them to report to another room in the Courthouse, warned them not to discuss the case with anyone including their “fellow jurors” and to report any attempt by anyone to talk to them about the case. To insure that there would be no contact at all with the deliberating jurors, Judge Pollack kept the deliberating jurors in the courtroom until the alternate jurors went into the jury room and removed their personal possessions. After their departure, the twelve deliberating jurors left the courtroom and retired to the jury room in the custody of the United States Marshal, in whose custody they remained until they returned a verdict that same afternoon. No alternate juror was ever substituted. (Tr. 1803-06).

In *Hayutin* and *Nash*, *supra*, this Circuit squarely rejected the contention that a trial court’s failure to discharge alternate jurors prior to deliberations is *per se*

* Doubtless Judge Pollack was influenced to do this by the outcome of the first trial when, as a result of a juror’s heart attack during deliberations, many weeks of work by all concerned were set at naught. More generally, as one commentator has put it, “It is not sensible to keep alternate jurors during a long trial, and then discharge them before the work of the jury is completed.” L. Orfield, “Trial Jurors In Federal Criminal Cases,” 29 F.R.D. 43, 53 (1963). Amendments to Rule 24(c) which would expressly sanction the substitution of alternates during deliberations have been proposed by various federal judicial conferences, *see, e.g.*, 37 F.R.D. 71, 74 (1965); and, particularly in light of recent Supreme Court cases permitting modifications of common law jury practices (*e.g.*, *Williams v. Florida*, 399 U.S. 78 (1970)), even the superficially strict language of Rule 24(c) may now be interpretable with greater flexibility.

prejudicial to the defendant. Instead, the appellate court must look to the record to see if any prejudicial contact occurred between the deliberating and alternate jurors. As indicated, the record here is dispositive. It shows that at 12:20 p.m., immediately following the Court's charge and the departure of the alternate jurors to another room, the deliberating jurors were taken into the guard of the marshals and did not emerge again until 5:30 p.m., when they delivered their verdict. Thus, there was no opportunity for any prejudicial contact with them by the alternate jurors, and consequently no basis for Ubben's request for a hearing. Rather, here, as in *Nash, supra*, "the record is barren of any prejudicial contact". (414 F.2d at 236).*

Ubben's second claim (UBr. 20-24) is a "catch-all" point, in which he mostly adopts by reference the claims made in Mahler's Brief that the Court improperly admitted Mahler's prior convictions, improperly interceded in the questioning of Mahler's first witness (Hecht), and improperly weighted the charge.** Since these claims have already been disposed of in the preceding sections of this brief, it remains here only to add that it is hard to see, in any event, how either the Court's intercession in Hecht's testimony or its admission of Mahler's prior convictions prejudiced Ubben in any material respect. Hecht's testimony whatever its dubious value in Mahler's

* The cases (entirely from other circuits) relied on by Ubben are inapposite, because, among other distinctions, they all involved situations where an alternate juror was physically present in the jury room itself after deliberations had begun.

** As to the latter, for example, Ubben does not specify in any way how the charge was "improperly weighted" (let alone show how he can claim to have preserved any such errors for appeal when he failed to raise specific objections at trial), but simply says he "rests" on the discussion in Mahler's Brief. (UBr. 24).

case, was wholly irrelevant to Ubben.* As for Mahler's prior convictions, they were admitted only as to Mahler (Tr. 741) and, on their face, related to events well before Mahler and Ubben had worked together. Thus, there was no danger at all of the jury engaging in "guilt by association." Moreover, at trial, Ubben's counsel never raised any objection along these lines; he neither moved for a severance, sought a limiting instruction beyond that given by the Court, or sought any other form of relief. His claim to this Court that the introduction of Mahler's convictions "enabled the Government to argue . . . that Ubben's guilt was proven by his association with such a person [as Mahler]" is flatly unsupported by anything anywhere in the record. Indeed, not only did the Government never so argue, but Judge Pollack, adding to his earlier limiting instructions, specifically warned the jury against guilt by association (Tr. 1712).**

The only claim in Ubben's second point that can even arguably be said to relate directly to Ubben is his contention that Judge Pollack erroneously curtailed his cross-examination of the government witness Braverman.

* As Ubben describes it, Hecht's testimony had three purposes: "to exculpate Mahler by showing a general modus operandi consistent with legality which Mahler but not Zucker observed; to report on a Zucker statement in a private litigation with Mahler . . . ; and to demonstrate that there was a genuine legal basis for the Industries Bell-Ko merger (SEC Rule 133)." The first two purposes on their face relate only to Mahler, and the third—expounding the law—is (as noted earlier) a matter for the judge and not for Hecht at all.

** This Circuit has often recognized that "when similar act evidence is admitted in a multiple defendant trial . . . there is little doubt that a cautionary instruction is sufficient to preserve the co-defendant's right to a fair trial." *United States v. Rosenwasser*, 550 F.2d 806, 809 (2d Cir. 1977), *cert. denied*, — U.S. — (1978). See *United States v. Payden*, 536 F.2d 541, 543 (2d Cir. 1976), *cert. denied*, 429 U.S. 923 (1977); *United States v. Papadakis*, 510 F.2d 287, 295 (2d Cir.), *cert. denied*, 421 U.S. 950 (1975); *United States v. De Sapio*, 435 F.2d 272, 280 (2d Cir. 1970), *cert. denied*, 402 U.S. 999 (1971).

Braverman, an accountant, was a minor Government witness whose direct testimony consumed all of 10 pages (Tr. 470-80). Basically, he presented calculations he had prepared from Industries International's books and records showing what terrible financial shape the company was in at the time of the events in question. He also gave his expert opinion that the financial statements for Industries International prepared (at Ubben's behest) by Lawrence Bialek were inaccurate and improper and that these "disparities," in his opinion, "could not have been accidental". (Tr. 480).

Ubben's counsel cross-examined Braverman at considerable length (Tr. 481-93) without even the slightest curtailment by the Court or, for that matter, a single objection from the Government. Hence Ubben is hard-pressed to complain here of "curtailment," let alone to show how he preserved any issue for appeal. After Braverman was excused and a recess had been taken, Mahler's counsel belatedly sent a note to Judge Pollack complaining that Braverman's opinion (about the Bialek inaccuracies not being accidental)—to which Mahler had not objected at the time—was objectionable in light of Bialek's acquittal at the first trial. (Court Ex. 4; G App. 145). Apprised of this note, Ubben's counsel went further and claimed that the Government's elicitation of this opinion from Braverman "opened the door" to Ubben's introducing Bialek's acquittal into evidence (Tr. 496). However, he never did offer this evidence.

On this record, Ubben now contends that the District Court erred when it "refused to permit Ubben's counsel to utilize Bialek's acquittal in the prior trial in challenging [Braverman's] opinion on cross-examination." (UBr. 20). This is frivolous, since the record is clear that Ubben's counsel never offered to cross-examine Braverman with reference to Bialek's acquittal, either when Braverman was on the stand or even in the colloquy that followed thereafter. Since he never made such an

offer, Judge Pollack never ruled on it; hence there is nothing for this Court to review. Cf. *United States v. Nathan*, 536 F.2d 988, 992 (2d Cir. 1976), *cert. denied*, — U.S. — (1977).*

Ubben's final claim (UBr. 25-27) is that his eight year sentence was excessive and disproportionate "to those commonly received in like cases" (UBr. 25). His argument is without either factual or legal foundation.

The evidence at trial established beyond doubt that Ubben was second only to Mahler in culpable responsibility for this sordid nationwide swindle and probably realized more money from it than any other of the 15 convicted participants. In furtherance of the illegal scheme, Ubben not only directed numerous subordinates to lie and cheat and steal, but also he personally forged phony documents, hid stock in nominee names, pocketed money obtained under false pretenses, misled and "used" friends, relatives and loved-ones, told an endless series of falsehoods, and, ultimately, resorted to threats of physical violence (*e.g.*, Tr. 1621). Moreover, similar act evidence elaborated primarily at the first trial showed that in 1972 and 1973 Ubben was a central participant in two other securities

* Moreover, had Judge Pollack made such a ruling, it would have been perfectly proper. Nothing about Bialek's acquittal made it probative of any issue in this case, let alone relevant to Braverman's opinion that the manner in which Bialek prepared the financial statements "could not have been accidental." At the first trial, Bialek had neither claimed that his financial statements were the product of accidental preparation nor that they accurately and properly reflected the financial state of Industries International; rather Bialek had contended that he had been duped by Ubben and Lovejoy into thinking that what he was preparing were simply "projections" for "internal use only," and he therefore inserted the figures given him by Lovejoy and Ubben without ascertaining their accuracy or attempting to fit them into the financial format appropriate to financial statements issued to the public (*e.g.*, ITr. 4806-08, 4891-93). If, as seems likely, the jury acquitted Bialek because it credited his story, then his acquittal was, if anything, probative of Ubben's guilt.

frauds, "HUP" and "UGBI." Also, at both trials of this case, Ubben testified and, in the express findings of both Judge Frankel and Judge Pollack, committed perjury. As Judge Pollack stated in imposing sentence:

"[O]n the witness stand [Ubben] perjured himself beyond a reasonable doubt in attempting to exculpate himself from miserable, shoddy, unlawful, deceitful practices which included the reprehensible attempts to misuse family and friends for the illicit schemes." (December 8, 1977 Tr. 22).*

Compared to others sentenced in this case, Ubben's sentence of eight years fairly corresponded to his major role. Thus, Judge Pollack sentenced the most culpable figure of all, Mahler, to twelve years. He sentenced the third figure, Lovejoy, to three years. He sentenced Hughes, a low-level figure who pleaded guilty and cooperated with the Government, to three months. And he sentenced Bachmann, the only one of the defendants who was permitted to plead to a misdemeanor, to a fine.

Nor was Ubben's sentence out-of-line with sentences imposed in comparable cases in this District and elsewhere in recent years, as Courts have increasingly recognized the deterrence and public safety rationales underlying the need for meaningful sentences in white collar

* Similarly, at the first trial, while Ubben was still on the stand, Judge Frankel took the extraordinary step of calling Ubben and his attorney to the side bar and stating: "I am not believing you— . . . I imagine the jury is not believing you too, but that is not my problem, that's your problem and [your attorney's]. But I just want to inform you that I'm not believing you, and inform you in good faith that . . . some grand jury might some day consider that perjury. I'm just advising you of that . . . [b]ecause I believe you are not telling the truth." (ITr. 3849-50). Ubben's perjury was properly considered in imposing sentence. *United States v. Hendrix*, 505 F.2d 1233, 1237 (2d Cir. 1974).

criminal cases. For example, in a recent mail fraud case in this District, *United States v. Lofland*, 75 Cr. 796, *aff'd without opinion*, Dkt. No. 75-1439 (2d Cir., March 24, 1976), *cert. denied*, — U.S. — (1976), Judge Owen imposed a fifteen year sentence on a swindler of Ubben's level. Likewise, in just the past few weeks, ten year prison terms have been imposed in comparable fraud cases in federal courts in Los Angeles, Philadelphia, and Kentucky, respectively.* Indeed, in one recent federal case in Texas, *United States v. McCord*, Cr. 3-76-132 (N.D. Tex. 1976), *aff'd without opinion sub nom. United States v. Deaton*, Dkt. No. 77-5257 (5th Cir. 1977), the main defendant in a mail fraud case received 50 years imprisonment, five other defendants received sentences between 15 and 25 years, and the remaining defendant (who pled guilty and cooperated with the Government) received a ten year sentence.**

In any event, the length of Ubben's sentence is a matter totally within the discretion of the district judge who presided over this factually complicated case. As this Court recently noted, "[a] judge who has presided over a lengthy trial often gains an intimate insight into the circumstances of the defendant's crime, which may prove uniquely useful in determining the sentence to be

* The Los Angeles case, *United States v. Marlin*, is reported in the *Wall St. Journal*, for April 11, 1978 at p. 22; the Philadelphia case, *United States v. Egelston*, is reported in the *Wall St. Journal* for March 13, 1978 at p. 27; the Kentucky case, *United States v. Kaye and Calanderalla*, is reported in the *New York Law Journal*, for March 22, 1978 at page 23.

** Ubben (relying on a 1972 study) states that defendants in stock fraud cases in this District "receive an average sentence of 21.5 months" (UBr. 25). The key word here is "average". The average sentence imposed on the 15 defendants convicted in the Industries International case was only 19.1 months—but, of course, it ranged all the way from Mahler's 12 years to Bachmann's \$500 fine.

imposed . . .” *United States v. Robin*, 553 F.2d 8, 11 (2d Cir. 1977). This Court has consistently declined to review sentences within the statutory maximum unless the record indicates reliance by the trial court on materially incorrect information or some constitutionally impermissible practice in connection with the imposition of sentence. *United States v. Seijo*, 537 F.2d 694 (2d Cir. 1976); *United States v. Estremera*, 531 F.2d 1103, 1113 (2d Cir.), cert. denied, 425 U.S. 979 (1976). See also *Dorszynski v. United States*, 418 U.S. 424 (1974); *United States v. Tucker*, 404 U.S. 443, 447 (1972); *United States v. Lomont*, 565 F.2d 212 (2d Cir. 1977), cert. denied, — U.S. — (1978).*

Ubber’s Brief does not so much as suggest that Judge Pollack relied on any improper or incorrect considerations in imposing sentence. Accordingly, appellate review of the sentence imposed, which was well within the statutory maximum of 65 years, is not available.

* The cases cited in Ubber’s brief stand solely for the proposition that a case will be remanded for resentencing when, in imposing sentence, the judge relied upon improper or incorrect considerations. *United States v. Ramos*, — F.2d —, Dkt. No. 77-1271 (2d Cir. Feb. 5, 1978) (defendant’s refusal to cooperate with Government held against him); *United States v. Stein*, 544 F.2d 96 (2d Cir. 1976) (more recent favorable presentence recommendation overlooked by the judge who relied on outdated unfavorable report).

CONCLUSION

The judgments of conviction should be affirmed.

Respectfully submitted,

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AFFIDAVIT OF MAILING

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

~~JED S. RAKOFF~~, being duly sworn,
deposes and says that he is employed in the office of
the United States Attorney for the Southern District
of New York.

That on the ~~24th~~ 24th day of April, 1978,
he served a copy of the within brief by placing the same
in a properly postpaid franked envelope addressed:

- (1) DAVID BLACKSTONE, ESQ.
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- (2) JAMES E. SHARP, ESQ.
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and deponent further says that he sealed the said envelope
and placed the same in the mail box for mailing at One St.
Andrew's Plaza, Borough of Manhattan, City of New York.

Sworn to before me this
~~24th~~ 24th day of April, 1978.

~~JED S. RAKOFF~~
F. T. Dan

Pamela R. Chafetz
PAMELA R. CHAFETZ
Notary Public, State of New York
No. 31-4021-001
Qualified in New York County
Commission Expires March 30, 1979